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# ARTICLES

## THE RIGHTS OF MIGRANTS: AN OPTIMAL CONTRACT FRAMEWORK

ADAM B. COX<sup>†</sup> & ERIC A. POSNER<sup>‡</sup>

*Why do migrants enjoy some of the rights associated with citizenship? Existing accounts typically answer this question in terms of obligation—of a duty on the part of states to confer citizenship. Moreover, scholars tend to lump together the rights conventionally associated with citizenship when they answer this question. In contrast, this Article disaggregates the rights associated with citizenship, asks what both states and migrants want, and inquires into how the suite of rights associated with citizenship might advance those interests. States want to encourage migrants to enter their territory and to make country-specific investments, but states also have an interest in being able to remove migrants or make their lives less comfortable if circumstances change. However, migrants will not enter and make country-specific investments if the state can easily remove them or change the conditions in which they live. Accordingly, the optimal “migration contract” between the state and the migrant reflects the trade-offs between commitment and flexibility. We discuss ways in which basic rights to liberty and property, political rights including voting, and other rights may embody the optimal contract in different circumstances.*

INTRODUCTION .....	1404
I. BACKGROUND .....	1410
A. <i>Conceptual Distinctions</i> .....	1410
1. <i>Rights Versus Obligations</i> .....	1410
2. <i>Right to Political Participation</i> .....	1411
3. <i>Right to Remain</i> .....	1411
4. <i>“Basic Rights”</i> .....	1412
5. <i>The Temporal Dimension of Rights</i> .....	1412
6. <i>The Expressive Value of Citizenship</i> .....	1413
B. <i>The Contingency of Migrant Rights in the United States</i> .....	1413
II. THE BASIC THEORY .....	1417
A. <i>Demand Side: What Migrants Want</i> .....	1418

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B.	<i>Supply Side: What States Want</i> .....	1422
C.	<i>The Optimal Content of Migrant Rights</i> .....	1426
D.	<i>The Optimal Strength of Migrant Rights</i> .....	1433
III.	COMPLICATIONS .....	1436
A.	<i>Exit Rights</i> .....	1437
B.	<i>Families</i> .....	1438
C.	<i>Voting Rights</i> .....	1441
D.	<i>The Role of Employers</i> .....	1445
E.	<i>Internal Political Economy</i> .....	1447
IV.	INTERACTION EFFECTS .....	1453
A.	<i>Labor Competition and Market Segmentation</i> .....	1454
B.	<i>Dual Citizenship</i> .....	1457
C.	<i>Refugees and Asylum-Seekers</i> .....	1461
	CONCLUSION .....	1463

## INTRODUCTION

It is bedrock policy that citizens and noncitizens are to be treated differently. Virtually no one believes that noncitizens should have the right to vote or to run for office. Many noncitizens—including tourists, business people, and the spouses of certain visa holders—do not even have the right to work or to change jobs. All noncitizens face the risk of deportation if they commit certain crimes; citizens, by contrast, can never be exiled. The U.S. Supreme Court has recognized that the constitutional rights of noncitizens are limited.<sup>1</sup> Like the United States, other countries draw a sharp line between citizens and noncitizens, and recognize that citizens have more rights than noncitizens do.

If citizens and noncitizens may be treated differently, *how* differently may they be treated? Most scholars answer this normative question on the basis of doctrine or political theory. Doctrinal accounts attempt to derive noncitizens' rights from constitutional and legal traditions.<sup>2</sup> Political theories derive noncitizens' rights from various theoretical conceptions of democracy and citizenship.<sup>3</sup>

<sup>1</sup> See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 78 (1976) ("The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship . . ."); see also *Kleindienst v. Mandel*, 408 U.S. 753, 765–70 (1972) (recognizing Congress's long-established ability to exclude aliens); *Galvan v. Press*, 347 U.S. 522, 530–32 (1954) (noting Congress's ability to enact statutes deporting aliens).

<sup>2</sup> See generally GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996) (exploring constitutional treatment of immigrants historically in effort to resolve current controversies in immigration law).

<sup>3</sup> See generally T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* (2002); HIROSHI MOTOMURA,

Largely overlooked, however, are equally important descriptive questions: Why do governments, such as the U.S. government, grant any rights to noncitizens at all? Why have the rights of noncitizens improved over the years? And why do they still fall short of the rights enjoyed by citizens? In other words, if we assume that policy toward noncitizens reflects the interests of states, what policies would we predict states to have, and how do we explain variations across states and across time?

On a naive view, for example, one might think that states would give noncitizens no rights at all. Why give rights to people who do not belong to one's political community? However, it is clear that states give rights to noncitizens, particularly migrants, in part to give them certain incentives: to enter the country, to work and pay taxes, and to augment the population.

At the same time, the granting of rights to migrants constrains states. Migration policies that serve the national interest during times of peace and economic prosperity may quickly become unpopular when those times change. States prefer flexibility *ex post*, so they can change migration policy when circumstances change. But, if they insist on such flexibility and hence grant minimal rights to migrants, migrants will have weak incentives to enter the country in the first place.

Migrants' rights vary along two dimensions. First, they differ in their scope. In the United States, migrants are classified in many different ways, and each class enjoys a different bundle of rights. People who enter the country illegally have certain basic rights—to life, to property, to minimal process—but little more. People who enter legally have more generous rights, but their rights are still more limited than those of citizens. For example, tourists and the spouses of certain migrants have basic rights to life, property, and criminal and civil process, but they do not have the right to work for pay or to remain in the country beyond the period of their visas. Migrants with work visas have the right to work in certain positions but often no right to change jobs.

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AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006); PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* (1998); PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* (2008); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983); Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 *REV. POL.* 251 (1987); Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 *U. PA. L. REV.* 1147 (1997).

Lawful permanent residents have the right to work as well as the other rights described above, but do not enjoy the right to vote. And whereas citizens cannot be “removed” (exiled), lawful permanent residents and other migrants can be removed (deported) for committing certain crimes, posing a security threat, and so forth. Lawful permanent residents are granted an additional important right: the right to become citizens after they have resided in this country for five years, passed a citizenship exam, and satisfied certain other conditions. Some migrants, therefore, but not others, are granted the right to acquire full citizenship rights through naturalization.<sup>4</sup>

Migrants’ rights also vary along a second dimension: their “strength,” or, more precisely, the difficulty or ease with which the government can change them. At one extreme, rights can be administrative: The executive branch has the sole discretion to determine the rights of migrants and can change them at any time. Rights can also be statutory: Congress determines and changes them. At the other extreme, rights can be constitutional, in which case they may be changed only by amendment or through judicial interpretation of the Constitution. Migrants enjoy all three types of rights. For example, the Constitution sets some basic minima for process rights, which statutes and administrative regulations have elaborated on and extended.<sup>5</sup>

This Article investigates variation in both the content and strength of migrant rights. It also analyzes one type of right, the right to vote, that cuts across these two categories. Voting rights (as well as other rights of political participation) are important citizenship rights. The holder of voting rights has the power to affect political outcomes by influencing the selection of public officials. In one sense, voting rights are an aspect of the content of migrant rights: Migrants who can vote have rights that other migrants lack. In another sense, voting rights also affect the strength of migrant rights, including the strength of voting rights themselves. Although in theory Congress could eliminate a migrant’s voting right by repealing the statute that created it, doing so would be more difficult than repealing other types of migrant rights because migrants would likely vote against politicians who appeared inclined to repeal their voting rights.

In the United States, nonresident aliens and other migrants rarely have voting rights, and when they do, they are at the municipal level and are limited.<sup>6</sup> However, in the past, migrants were granted more substantial voting rights at the state level, as we will discuss.<sup>7</sup> Even

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<sup>4</sup> See *infra* Part I.A–B.

<sup>5</sup> See *infra* Part I.B.

<sup>6</sup> See *infra* note 38.

<sup>7</sup> See *infra* text accompanying notes 47–52.

today, voting rights remain an important aspect of the incentive system used to lure migrants to the United States: migrants are promised that if they qualify for citizenship and naturalize, they will have the right to vote.<sup>8</sup> We can thus think of contingent, deferred voting rights as an aspect of the bundle of migrant rights.

To explain the content and strength of migrant rights, we borrow the optimal contract framework developed by economists to analyze contractual behavior.<sup>9</sup> Although migrants do not enter into actual contracts with the U.S. government, their relationship with the U.S. government is analogous to a contractual relationship. Both sides gain from an implicit deal. The migrant enters the United States, invests in learning English and aspects of American culture, and obtains a return in the form of higher wages, a share of public goods, and other benefits. The U.S. government—which we use as a stand-in for native citizens—gains in diverse ways: Increased tax revenues help finance public goods, labor costs are reduced, and the migrant contributes to cultural and social life.

In thinking about these issues, most people focus on the question of how the government should select among migrants. The world presents a large pool of potential immigrants, and states have to figure out how to separate those immigrants it considers desirable from those it does not.<sup>10</sup> The debate focuses on the desirability of certain characteristics such as labor skills and familial relationships with American citizens. But there is another problem of equal importance: how the “migration contract” between the migrant and the U.S. government should be designed once a particular migrant is selected. The main problem for the government is that a migrant who is highly desirable at the time of migration might turn out to be undesirable at a later time. All else equal, the government would like to retain the option to remove any migrant any time events change such that the benefits from the migrant’s presence no longer exceed the costs.

However, the problem with such flexibility is that a migrant will not enter a country, or will enter but decline to sink roots in that country, if she knows that she can be removed at any time. Many migrants do best by making what we will call “country-specific investments”—like learning the dominant language and developing social networks—but a typically risk-averse migrant will not make such

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<sup>8</sup> See *infra* text accompanying notes 63–65, 118–27 (discussing conditions under which voting rights are most likely to change migration incentives).

<sup>9</sup> See generally PATRICK BOLTON & MATHIAS DEWATRIPONT, *CONTRACT THEORY* (2005) (providing introduction to economic modeling of contracts).

<sup>10</sup> We focus on these screening issues in Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 *STAN. L. REV.* 809 (2007).

investments if she can be easily removed. Moreover, migrants may worry that the government will wield its removal power opportunistically, trumping up security threats or exaggerating financial downturns in order to justify deportation.

Governments, too, often want migrants to make country-specific investments, so it is in their interest to guarantee a migrant's right to remain even if bad events occur—at least up to a point. It will therefore sometimes be in a nation's interest to tie its own hands so that it cannot use its deportation power opportunistically. The optimal migration contract balances the government's interest in flexibility and the migrant's interest in tying the government's hands. It can do so in two ways: by granting migrants more or less generous rights and by making it harder or easier for the government to change those rights.

Our approach helps expand the possibilities for legal design by showing why different packages of rights might be conferred on different groups of migrants. Much existing scholarship suggests that there is a relatively static, hierarchical relationship among various migrants' rights.<sup>11</sup> On these accounts, rights increase in lock-step with increasing "membership" in the Receiving State. Rights are also arranged hierarchically, with rights like political participation almost always associated with higher levels of membership than are rights like occupational freedom. Our account abandons this idea of a lexical relationship among various rights associated with citizenship.

We also abandon the prevalent assumption in the literature that all migrants should be accorded the same rights.<sup>12</sup> Migrants come with various goals: Some hope to come and work in a Receiving State for a short time, others hope to remain for a long time but expect eventually to return home, and others intend to remain permanently. Each of these groups of migrants will value rights differently: For some, the right to remain for a guaranteed period of time will be far more important than occupational freedom, while others will have the opposite preferences. As a result, our approach makes it possible to

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<sup>11</sup> There is some ambiguity in this literature about whether the hierarchy of rights is intended as a descriptive account of existing practices or a normative account of what the structure of migrants' rights should look like. Often the literature appears to make both claims. See, e.g., ALEINIKOFF, *supra* note 3, at 172; JOHN HART ELY, *DEMOCRACY AND DISTRUST* 161–62 (1980) (describing and assuming appropriateness of hierarchical relationship between political rights and other rights for migrants); MOTOMURA, *supra* note 3, at 11–13 (discussing hierarchical relationship among types of rights); WALZER, *supra* note 3, at 60 (assuming appropriateness of such hierarchical relationship during post-entry transition period).

<sup>12</sup> See, e.g., WALZER, *supra* note 3, at 52–65 (rejecting differentiation between classes of migrants).

see why we should expect variation in the optimal migration contracts—variation that is hard to evaluate within the literature’s existing frameworks.

The rest of this Article unpacks our argument. Part I introduces the relevant conceptual distinctions and provides a brief overview of relevant aspects of American immigration law and its history. Part II provides a simple theoretical account of the optimal migration contract between migrant and government. Part III addresses some real-world complications by relaxing the basic model’s assumption that the contract involves only two parties. Part IV discusses ways in which the immigration policies of different countries interact.

This Article builds on the economic approach to immigration law that we developed in an earlier article.<sup>13</sup> In this approach, the relationship between the Receiving State and the migrant is treated as though it were a contractual relationship, which allows one to use ideas from the optimal contract literature in economics. As in all contractual relationships, the two parties have partially overlapping interests. States gain by allowing migrants to enter, and migrants gain by entering states. But each side of the transaction does better by retaining flexibility unavailable to the other. The contracting problem is to choose “terms”—that is, immigration laws—that maximize the joint benefit.

The theme of this paper is that the optimal migration contract between migrant and government—that is, the package of rights that the migrant receives—is shaped by a central precommitment problem: Governments seek to attract migrants with desirable skills and characteristics, but also want to maintain flexibility so that the migrants can be expelled or otherwise regulated as changing circumstances develop. However, if governments maintain flexibility, migrants will be reluctant to enter and invest in their relationship with the Receiving State. The optimal migration contract depends on (and hence changes with) a host of exogenous variables. Rights will be weaker, for example, when governments expect that the risk of future adverse events is high. They will be stronger when governments gain a net benefit as migrants make country-specific investments. With an understanding

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<sup>13</sup> See generally Cox & Posner, *supra* note 10. As we explained in that paper, the economics literature focuses on first-order issues—the optimal number and types of migrants. In this Article we evaluate second-order issues, that is, issues of the structure and design of migration policy. For some related work in the law and economics literature, see Nancy H. Chau, *Strategic Amnesty and Credible Immigration Reform*, 19 J. LAB. ECON. 604 (2001). For emerging work by immigration scholars, see, for example, Eleanor M. Brown, *Outsourcing Immigration Compliance* (Harv. Law Sch. Pub. Law & Legal Theory, Research Paper No. 08-12, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1131022](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1131022).



of the relationship between these variables, one can explain some of the variation in the rights granted to migrants.

## I BACKGROUND

This Part begins by introducing the relevant conceptual distinctions and briefly explaining the contingent nature of migrants' rights in American law.

### A. *Conceptual Distinctions*

In determining how many people to admit, and what type, the host country must also resolve a number of difficult questions regarding how migrants, once in its territory, are to be treated. Consider the following baseline: Migrants are treated exactly the same as citizens. The baseline system entails that once a person is lawfully admitted into the host country, she would have the right to vote, the protection of the criminal process, etc. She could not be removed, for removal is identical to exile, and citizens may not be exiled. She would also have certain obligations: to follow the law, to pay taxes, to serve on juries, etc.

In practice, this baseline never prevails. No state treats migrants exactly the same as citizens. To clarify the differences, we make several conceptual distinctions.

#### 1. *Rights Versus Obligations*

Citizens have various obligations. Broadly, they must obey the law, which usually involves duties such as paying taxes, sitting on juries (in the United States), and serving in the military (in many countries). Citizens also have rights, such as free speech, a trial prior to punishment for a crime, and property ownership. There have been cases in history where noncitizens have had privileges exempting them from obeying some or all of the laws that bind citizens.<sup>14</sup> Today, these privileges are relatively minor, such as the privilege not to serve on a jury in the United States. For the most part, we will assume that citizens and noncitizens have the same obligation to comply with general law, such as tax law. Our focus is on rights.

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<sup>14</sup> Foreign diplomats are the classic example here. See 22 U.S.C. § 254(b) (2006) (granting "privileges and immunities" to foreign diplomatic and consular officers in accord with Vienna Convention and executive decree).

## 2. *Right to Political Participation*

In democracies, citizens have the right to vote, to join political organizations, to voice political opinions, and to participate in other ways in the democratic process. Noncitizens generally have no voting rights (although there are some minor exceptions).<sup>15</sup> Noncitizens may also be subject to certain restrictions on lobbying.<sup>16</sup> However, noncitizens generally enjoy the same speech and association rights that citizens do.<sup>17</sup> In principle, political participation rights could be further disaggregated. Noncitizens could be given the right to vote but not to join parties, for example, or to vote on certain issues but not on others, or to vote for candidates for some offices but not for others.

## 3. *Right to Remain*

In the United States and most other countries, citizens have the right not to be exiled.<sup>18</sup> Historically, exile was a common punishment,<sup>19</sup> but no more. In contrast, noncitizens have circumscribed rights to remain. In the United States, for example, noncitizens may be removed if they pose a security threat or commit a serious crime.<sup>20</sup> In addition, noncitizens may be removed if their visas expire and they do not obtain the right to permanent residency. Unlike citizens, noncitizens who leave American territory may, under certain circumstances, be denied reentry.<sup>21</sup> These rights could be even further disaggregated. For example, a migrant could have the right to remain unless a war between her country and the host country erupts.

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<sup>15</sup> See, e.g., ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 33–40 (2000) (discussing history of noncitizen voting in United States).

<sup>16</sup> See Bruce D. Brown, *Alien Donors: The Participation of Non-citizens in the U.S. Campaign Finance System*, 15 *YALE L. & POL'Y REV.* 503, 508–18 (1997) (summarizing current federal statutory prohibitions against campaign contributions by foreign nationals who are not lawful permanent residents).

<sup>17</sup> See, e.g., *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (“Freedom of speech and of press is accorded [to] aliens residing in this country.” (citing *Bridges v. California*, 314 U.S. 252 (1941))).

<sup>18</sup> See *Nguyen v. INS*, 533 U.S. 53, 67 (2001) (noting that citizen of United States has “the absolute right to enter its borders”); *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (prohibiting government from exiling citizen by first stripping him of citizenship).

<sup>19</sup> See, e.g., GORDON P. KELLY, *A HISTORY OF EXILE IN THE ROMAN REPUBLIC* (2006).

<sup>20</sup> See Immigration and Nationality Act (INA) § 237, 8 U.S.C. § 1227(2)–(6) (2006) (enumerating grounds of deportability).

<sup>21</sup> See INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (specifying circumstances under which even lawful permanent resident who travels abroad will be considered to be “seeking an admission” and, therefore, subject to determination of inadmissibility); *Shaughnessy v. Mezei*, 345 U.S. 206, 214–15 (1953) (upholding government’s decision to deny reentry to longtime permanent resident who traveled abroad).

#### 4. "Basic Rights"

Citizens in the United States and most other democracies have many other rights, including the right to criminal process if they are accused of a crime, the right to own property and to receive compensation if it is confiscated by the state, the right to bring civil actions, and the right to be free from racial discrimination, among others. We will call these general or baseline rights "basic rights."<sup>22</sup> In principle, noncitizens could be denied these rights, or be given weaker protections. At least in the United States today, they generally are not (though there are exceptions and ambiguities).<sup>23</sup> The most important exception is the right to work: Many migrants do not have the right to work, or have the right to work but not to change jobs.<sup>24</sup>

#### 5. *The Temporal Dimension of Rights*

As a broad generalization, noncitizens gain more and stronger rights the longer they lawfully remain in the host country.<sup>25</sup> One might distinguish among people on temporary visas, lawful permanent residents, and citizens. Migrants in these different categories are often accorded different rights;<sup>26</sup> in addition, they are also sometimes

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<sup>22</sup> There is nothing talismanic about this label. Moreover, there is obviously some conceptual overlap among the three categories of rights we have identified. Our aim here is not to provide a comprehensive account of rights; rather, it is simply to delineate a few rough-and-ready distinctions that will facilitate the description of our model and help make sense of some common (and important) distinctions in immigration law and policy.

<sup>23</sup> See, e.g., U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491–92 (1931) (holding that Takings Clause applies to property in United States owned by noncitizens); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that noncitizens are entitled to Constitution's criminal procedure protections). Historically, some of these basic rights were restricted. For example, property ownership by noncitizens was controversial in early America. See *infra* notes 69, 162.

<sup>24</sup> See Juan Carlos Linares, *Hired Hands Needed: The Impact of Globalization and Human Rights Law on Migrant Workers in the United States*, 34 DENV. J. INT'L L. & POL'Y 321, 329–37 (2006) (detailing restrictions on seeking new employment that were placed on migrant laborers under Bracero and H-2A programs, which imported workers from Mexico, Bahamas, and West Indies).

<sup>25</sup> See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."):

<sup>26</sup> For example, lawful permanent residents can remain indefinitely and are free to work almost anywhere (or not at all). However, many migrants in the United States on temporary employment visas must leave the country after a few months or years and are not free to change jobs. See THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 396–438 (6th ed. 2008) (describing migrant categories).

given the right to move from one category to another.<sup>27</sup> Our focus will be principally on lawful permanent residents, who are people given permission to remain in a host country indefinitely. But an important issue is whether and under what conditions migrants are permitted to move from one category to another.

## 6. *The Expressive Value of Citizenship*

Citizenship may have a distinctive value irrespective of the legal rights and obligations associated with it. Imagine that the formal status of “citizen,” a label, is a separate legal right. That label might itself be important, even if it does not directly create any formal rights or obligations.<sup>28</sup> For example, the state could use the formal status as a signaling mechanism—as a signal to others about the person accorded the status or as a signal to the person herself.<sup>29</sup> To keep our analysis within reasonable bounds, we will ignore the expressive dimension of citizenship. Citizenship is a valuable status in large part because of the legal rights and privileges associated with it. Those rights will be our focus.

As we proceed with our analysis, we will hold the baseline rights of citizens constant and ask what explains the difference between migrants’ rights and citizens’ rights.

### *B. The Contingency of Migrant Rights in the United States*

Our general approach assumes that migrant rights are a policy choice. While this assumption is certainly a simplification, it is not contrived. The legal relationship in the United States among the bundled rights often associated with citizenship is complex, but a central feature is clear: The government retains considerable flexibility to adjust these rights for noncitizens.

This is true even if we treat constitutional law as an exogenous constraint on government action. American constitutional law imposes only modest restrictions on Congress’s authority to grant

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<sup>27</sup> See INA § 245, 8 U.S.C. § 1255 (2006) (adjustment of status); INA § 316, 8 U.S.C. § 1427 (naturalization rules).

<sup>28</sup> Consider the analogy to contemporary debates about gay marriage, where some argue that the legal label of “marriage” is important even if *identical* legal rights and obligations attach to both marriage and some other status like domestic partnership. See George W. Dent, Jr., *How Does Same-Sex Marriage Threaten You?*, 59 RUTGERS L. REV. 233, 252–53 (2007) (arguing that recognition of same-sex marriage would alter popular attitudes).

<sup>29</sup> See ERIC A. POSNER, *LAW AND SOCIAL NORMS* 112–33 (2002) (discussing signaling and its relationship to status); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 355–75 (1997) (discussing conditions under which desire for esteem creates norms and discussing reasons such norms may be strong).

rights to, or withhold rights from, migrants who have not acquired the formal status of citizenship. Constitutional law is most demanding with respect to basic rights: It obligates the state to afford all resident noncitizens basic criminal protections,<sup>30</sup> to refrain from discriminating against noncitizens on the basis of race,<sup>31</sup> and so on. As we described above, the main exception is the right to work.

But modern constitutional law places few limits on the government's ability to adjust up or down the right to remain and the participation rights of noncitizens. The right to remain is almost entirely unprotected by the Constitution. The Supreme Court does place some procedural restrictions on deportation,<sup>32</sup> and it may (though it is contested) prohibit the government from deporting noncitizens on the basis of their race<sup>33</sup> or the content of their speech.<sup>34</sup> Those limits aside, the government is free to remove noncitizens from the country for essentially any reason, and it can change retroactively the grounds of deportation.<sup>35</sup>

Matters are similar for political rights. There are a few constitutional protections: The First Amendment protects noncitizens' freedom to speak out on political matters,<sup>36</sup> and migrants cannot be excluded from some forms of government employment.<sup>37</sup> Nonetheless, the government can deny the most valuable right of participation: the right to vote.<sup>38</sup> The government also has wide latitude to

<sup>30</sup> *Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

<sup>31</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

<sup>32</sup> See *Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903) (holding that noncitizens should have “all opportunity to be heard upon the questions involving [their] right[s] to be and remain in the United States”).

<sup>33</sup> Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 66–72 (1998) (arguing that Court today would not uphold racial classifications in deportation law).

<sup>34</sup> See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 487–92 (1999) (leaving open possibility that selective deportation on basis of First Amendment activity may be prohibited in rare “outrageous” cases).

<sup>35</sup> See *Fong Yue Ting v. United States*, 149 U.S. 698, 723–24 (1893) (holding retroactive change to deportability grounds constitutionally permissible).

<sup>36</sup> *Bridges v. Wixon*, 326 U.S. 135, 147–48 (1945).

<sup>37</sup> See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432, 436–41 (1982) (observing that discrimination on basis of citizenship is highly suspect when employment serves economic rather than political goals); *Sugarman v. Douglass*, 413 U.S. 634, 643 (1973) (holding N.Y. CIVIL SERVICE LAW § 53(1) (Supp. 1972–1973) violated Equal Protection Clause because it prohibited *all* aliens from holding civil service positions).

<sup>38</sup> See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1431–41 (1993) (explaining that U.S. constitutional law has never been read to require enfranchisement of noncitizens); see also *infra* text accompanying notes 63–65, 118–27 (discussing why voting rights can be valuable for migrants and conditions under which they are likely to be most valuable).

restrict the rights of noncitizens to contribute to election campaigns.<sup>39</sup>

For citizens, matters are quite different. American constitutional law provides citizens an absolute right against exile and confers on them considerably more robust protection for political rights.<sup>40</sup> Moreover, it prevents the government from circumventing these rights by stripping people of citizenship.<sup>41</sup>

It is important to note, however, that nothing prevents the government from giving this more generous suite of rights to noncitizens. While constitutional law provides a floor of certain rights, it generally does not establish a ceiling. It need not be this way. The Constitution could establish a ceiling by prohibiting the government from granting voting rights to noncitizens or even from offering them the right of permanent residence without naturalization. The Constitution does contain at least one such ceiling: It prohibits noncitizens from holding certain elected offices. A person must have been a citizen for many years to be eligible for election to the U.S. Senate or House of Representatives (nine years for the Senate; seven years for the House).<sup>42</sup> To be eligible for the Presidency, a person must be not only a long-term resident but also a “natural born Citizen, or a Citizen of the United States, at the time of the Adoption of [the] Constitution.”<sup>43</sup> In general, however, the absence of such ceilings is part of what gives the government such flexibility.

In practice, the United States often grants legal rights that are more generous than what the Constitution requires. The generosity of these rights often depends on visa status and the migrants' length of residence. This is true for access to public assistance, which federal law makes available to permanent residents after five years;<sup>44</sup> for the right to reside, which immigration law protects somewhat more for

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<sup>39</sup> See Note, “Foreign” Campaign Contributions and the First Amendment, 110 HARV. L. REV. 1886, 1887–90, 1897–98 (1997) (noting current restrictions on campaign contributions by aliens but arguing that Congress should not be able to restrict aliens' First Amendment rights in that realm).

<sup>40</sup> See *supra* note 18 (discussing right against exile). See generally SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (3d ed. 2007) (surveying structure of political rights in America).

<sup>41</sup> See *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (holding that citizen may not be stripped of her citizenship unless it is relinquished voluntarily).

<sup>42</sup> U.S. CONST. art. I, §§ 2–3.

<sup>43</sup> *Id.* art. II, § 1.

<sup>44</sup> 1996 Personal Responsibility and Work Opportunity Reconciliation Act, 8 U.S.C. §§ 1612–1613 (2006) (describing circumstances under which permanent residents can become eligible for public assistance and other federal benefits).

long-term residents;<sup>45</sup> and for the right to vote, which is usually provided only upon naturalization after an extended period of residence.<sup>46</sup> Moreover, as the above examples suggest, migrants' rights are often treated by American law as though they have a sort of necessary hierarchy, with basic rights at the bottom, the right to reside in the middle, and participation rights at the top. But there is nothing about American constitutional law that makes this hierarchy necessary.

The current state of immigration law should not blind one to the possibility of different patterns. Indeed, American history supplies a striking example that is germane to our focus on migrant voting rights. In the nineteenth century, when many parts of the country were sparsely populated, encouraging settlement was a priority. Migrants could provide much-needed labor and, it was hoped, "raise land values, stimulate economic development, and generate tax revenues."<sup>47</sup> In 1789, the first Congress authorized aliens to vote in the Northwest Territories.<sup>48</sup> And beginning in the 1820s, western states began conferring voting rights on so-called "declarant" noncitizens. Immigrants in this period could officially declare their intention to become citizens (by filing what were known as "first papers") after living in the United States for at least two years.<sup>49</sup> Just like today, they were ineligible to naturalize until they satisfied the full five-year-residency requirement. But western states trimmed their wait for voting rights to a short two years by conditioning the franchise on the declaration rather than on naturalization.<sup>50</sup>

The spread of declarant voting laws suggests that the franchise was a valuable inducement for immigrants during this period. During a fight over the adoption of such a rule in Illinois, one legislator remarked that the right to vote was "the greatest inducement for men to come amongst us."<sup>51</sup> Thus, competition for settlers seems to have played an important role in the expansion of noncitizen voting. While noncitizen voting rules eventually waned (in part because of rising

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<sup>45</sup> See INA § 240A, 8 U.S.C. § 1229(b) (2006) (describing "cancellation of removal," which allows long-term residents to avoid deportation in some situations where they have engaged in otherwise deportable conduct).

<sup>46</sup> See INA § 316, 8 U.S.C. § 1427(a) (setting out durational residency requirement for naturalization).

<sup>47</sup> KEYSSAR, *supra* note 15, at 38.

<sup>48</sup> See Raskin, *supra* note 38, at 1402 ("[Congress's re-enactment of the 1787 Northwest] Ordinance gave freehold aliens who had been residents for two years the right to vote for representatives to territorial legislatures, and gave wealthier resident aliens who had been residents for three years the right to serve in these bodies.").

<sup>49</sup> See MOTOMURA, *supra* note 3, at 115–16 (describing declaration process).

<sup>50</sup> KEYSSAR, *supra* note 15, at 33.

<sup>51</sup> *Id.* at 38–39.

nativist sentiment and concerns about the growing political power of immigrants), at their peak they were adopted by more than a dozen states and were common everywhere outside the densely populated Northeast.<sup>52</sup>

Thus, the U.S. government, and the states as well, have had a great deal of flexibility in granting rights to migrants, and have used this flexibility for the purpose of attracting migrants and encouraging them to invest. We turn now to an analysis of the costs and benefits of different rights allocations.

## II THE BASIC THEORY

To explore the question of why migrants might be accorded a particular suite of rights by a host country, this Part first examines why noncitizens may value different types of rights in different ways. Noncitizens may value rights differently depending on their purposes for entering a country and the various institutional, political, and economic aspects of that country that attract (or repel) them. This Part then turns from migrants to nation-states, examining the “costs” that states incur when they grant rights to noncitizens. Here, we focus on the citizens of these states and ask what they lose when they give rights to noncitizens, and thus what rights they would be willing to grant to noncitizens in order to obtain the benefits of migration into their country. Putting these arguments together, we develop several hypotheses that explain what conditions might prompt a state to give a particular bundle of rights to migrants.

We begin with a simplified setup where a host country like the United States has migration policies that reflect the interests of its citizens.<sup>53</sup> We assume that citizens benefit from a certain amount and type of migration. This assumption is uncontroversial; few states, if any, prohibit immigration. However, there is a great deal of variation in how states benefit from immigration. Let us suppose that our hypothetical host country, modeled on the United States, gains from both unskilled and skilled labor. A larger workforce reduces the cost of goods and increases tax revenues that finance public goods, and while migration also reduces wages and increases congestion, we will imagine that our host country will choose a quantity of migration that maximizes net benefits. Note also that the host country will have

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<sup>52</sup> *Id.* at 33, 83–87.

<sup>53</sup> We assume a country like the United States—a modern democracy that enjoys the rule of law—because we are interested in the role that law generally, and rights of political participation in particular, play in our contract framework. A dictatorship with little respect for the rule of law would raise different questions.



varying preferences for different types of migrants, including skilled versus unskilled, temporary workers versus people who intend to establish permanent residence, people who have family relationships with citizens, and refugees.

### A. *Demand Side: What Migrants Want*

Migrants benefit from rights for the same reason that citizens do: Rights protect them from the actions of individuals and governments that might harm their interests. All else equal, a migrant will gain when the host country grants her legal and constitutional rights. Legal rights protect her from other people, arbitrary actions by the executive branch, and so forth; constitutional rights protect her from the state.

Let us make these points more concrete. A person who contemplates migrating to a Receiving State must make two decisions: first, whether to enter or not, and second, the degree of country-specific investment to make after entering. The first decision is straightforward; the second requires some discussion.

Entering and living in a foreign country entails two types of costs: variable costs and fixed costs. Variable costs include the day-to-day costs of living and working such as renting a residence and buying food. Many of these costs are financial; others are psychological or emotional but just as real—for example, the cost of being far away from one's family, from native speakers of one's language, or from people of a common culture.<sup>54</sup>

Fixed costs are those one-time expenses that a person incurs in the course of obtaining skills or assets that enable her to reduce her variable costs over the long term. In this straightforward sense, fixed costs are investments: One incurs the costs at some early time and enjoys the returns (in the form of reduced variable costs) over an extended period of time or at a later date.<sup>55</sup> For example, a person might learn the language of the host country, either prior to or after entry. Learning the language is an investment: Once the migrant learns the language, her variable costs of living in the host country will

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<sup>54</sup> See, e.g., Douglas S. Massey & Felipe García España, *The Social Process of International Migration*, 237 *SCI.* 733, 734 (1987) (discussing psychic costs of migration resulting from social and cultural distance between Receiving and Sending States); Larry A. Sjaastad, *The Costs and Returns of Human Migration*, 70 *J. POL. ECON.* 80, 84–85 (1962) (discussing psychic costs of migration that arise when people have to leave behind family and friends).

<sup>55</sup> See, e.g., Barry R. Chiswick & Paul W. Miller, *The Determinants of Post-immigration Investments in Education*, 13 *ECON. EDUC. REV.* 163, 167 (1994) (analyzing post-migration education decisions as decisions about whether to incur some fixed cost in order to obtain returns over duration of migrants' stay).

be lower. It will be easier to interact with people, fewer mistakes will be made, and translators and interpreters need not be hired. Other fixed costs include learning and absorbing cultural and social norms that enable the migrant to interact more effectively with the native people of the host country.

These fixed costs are often, but not always, country-specific. A country-specific investment is an investment (in money, time, and/or effort) that generates a return that has value only, or predominantly, in one particular country.<sup>56</sup> An American who learns Japanese in anticipation of moving to Japan makes a country-specific investment: The American can enjoy most of the benefits of knowing Japanese only if she stays in Japan. To be sure, she may also enjoy some benefits by staying in the United States and interacting with Japanese speakers in commercial or social settings, or by enjoying Japanese literature, but these benefits will generally be small compared to the gains from being employed in Japan.<sup>57</sup> A Japanese citizen who learns English also makes an investment, but this investment is not nearly as country-specific: She can travel to the United States, the United Kingdom, Australia, and other English-speaking countries, and indeed probably can obtain substantial returns even by staying in Japan. In fact, some investments can actually be more valuable to a migrant if she returns to her country of origin than if she remains in the host country.<sup>58</sup> Thus, the extent to which an investment in language-learning is country-specific depends on several factors, but as a general rule, learning a country's language and culture is a country-specific investment.

As noted above, country-specific investments can take place prior to admission to the host country. But often the most significant country-specific investments occur after admission. Many migrants learn the host country's language only after migration. Others improve their linguistic skills after migrating by interacting with citizens of the host country.<sup>59</sup> Also of great importance, migrants make country-specific investments by learning social and cultural norms, acquiring friends and associates among members of the host country, and in a general way obtaining local knowledge that is necessary to

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<sup>56</sup> For further discussion of this concept, see Cox & Posner, *supra* note 10, at 828.

<sup>57</sup> See Christian Dustmann, *Temporary Migration, Human Capital, and Language Fluency of Migrants*, 101 SCANDINAVIAN J. ECON. 297, 312 (1999) (analyzing relationship between investment in learning language and expected duration of residency).

<sup>58</sup> For a discussion of this motive for return migration, see Christian Dustmann, *Savings Behavior of Return Migrants: A Life-Cycle Analysis*, 115 ZEITSCHRIFT FÜR WIRTSCHAFTS- UND SOZIALWISSENSCHAFTEN 511, 528 (1995).

<sup>59</sup> RICHARD ALBA & VICTOR NEE, *REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION* 71-77, 217-30 (2003).

live successfully in the host country.<sup>60</sup> All these investments are country-specific because they are lost—that is, the return on the investments cannot be obtained, or can be obtained only in greatly diminished form—if the migrant is forced to leave the country prematurely.

Our basic claim is that many (but not all) potential migrants can benefit most from migration if they make country-specific investments and remain in the country long enough to obtain the full return on those investments, which may often be a lifetime. A migrant in this group will therefore naturally worry that the premise of these country-specific investments—that she will remain in the host country for a long period of time (if she so chooses) and that certain social and institutional features of the host country will remain constant—may be incorrect. She will therefore make country-specific investments only if she can predict that this premise will remain correct with a high enough probability.<sup>61</sup>

It should now be clear that our framework provides a central reason why migrants value rights: Rights protect their country-specific investments.<sup>62</sup> Minimal basic rights, such as the right to own property, will obviously matter to the migrant. If she cannot keep the returns on her investment—such as her paycheck—she will not make the investment. But these minimal basic rights will often be insufficient.

The migrant will also often desire the right to remain. One might think that as long as a migrant can keep her paychecks and sell her property before being removed, she would not need a right to remain. After all, these benefits should cover her variable costs from living in the host country, and so she gains on net. However, she values the right to remain in part because she cannot recover her country-specific investments unless she can stay in the host country for a long

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<sup>60</sup> See ALBA & NEE, *supra* note 59, at 260–70 (portraying effects of social relationships, including friendships and intermarriage, on immigrant acculturation patterns).

<sup>61</sup> Other migrants, however, may have no desire to make country-specific investments. For example, some noncitizens may be interested only in entering temporarily to engage in seasonal agricultural work.

<sup>62</sup> The claim that migrants value rights for this reason depends on migrants understanding the consequences of particular legal rights. Our basic model assumes that migrants have good information about the strength and scope of the host country's protections of migrants' rights. Obviously, some prospective migrants simply will not be familiar with the host country's laws and policies. Moreover, migrants from transitional democracies or countries with high levels of lawless behavior by officials may be skeptical that political participation or legal rights can actually protect their interests. This highlights the extent to which information policy can be an important aspect of a state's immigration policy. See Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 387–89 (2008).

enough period of time. The longer the duration of the right to remain, the higher the returns on country-specific investment and, therefore, the greater the country-specific investment that the migrant will make.

Political rights will also often be important to migrants. Even a migrant who enjoys the basic right to keep her property and the right to remain takes risks when migrating. The migrant also cares about her quality of life in the host country. This includes such things as the quality of the schools (if she has children), the convenience of parks, the degree of public safety, and other public goods supplied by the government. In particular, migrants will always be concerned about xenophobic reactions that result in harassment of migrants or new laws that limit their freedom and reduce their quality of life.<sup>63</sup> History shows with great clarity that a population that welcomes migrants when jobs are plentiful and the world is at peace will often turn against them during an economic downturn or an international crisis.<sup>64</sup> Strong migrants' rights bar such a reaction or mitigate its consequences.

Basic rights and the right to remain will, if enforced, prevent the worst forms of harassment. But migrants would prefer greater protection; they will worry that their rights could be changed *ex post* or go unenforced. One might imagine that migrants would want some sort of guarantee that the public policy of the host country will not change in some undesirable way. However, this is surely impractical. Conditions change and governments must adopt new policies to address new problems that arise. Thus, the migrant's most realistic protection against new policies that reflect change but that disappoint the migrant's reasonable expectations is the right to vote and to engage in other forms of political participation. The migrant can potentially use her vote to block policy changes that benefit citizens little while harming migrants a great deal, but not to block policy changes that benefit citizens a great deal while harming migrants only a little—policy changes that are more likely to be justified by new conditions. Because citizens are more likely to be divided over policies that benefit them little, the migrant vote can tip the balance. To be sure, one vote does not make a difference, but when a large number of

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<sup>63</sup> See generally JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925* (2d ed. 1992) (chronicling American history of nativist reactions to immigration).

<sup>64</sup> See, e.g., GEOFFRÉY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 29–33, 283–303 (2004) (describing rise of nativism in times of war); ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 87–90, 153–56 (2006) (linking nativism to national-security and economic troubles).

migrants have located in the host country, or within a particular town or area of the host country, their combined voting power may mitigate the amount of official and unofficial harassment that might occur during a period of stress.<sup>65</sup>

Our final point is that basic rights, the right to remain, and political rights matter more to people who make greater country-specific investments and therefore need a longer period of time and greater freedom to obtain a sufficient return on those investments.<sup>66</sup> If migrants do not make country-specific investments, they may still value rights, but they will likely not value them as much. For that reason, permanent migrants generally value rights more than temporary migrants.<sup>67</sup> Permanent migrants seek to establish a permanent residence in the host country. For them, country-specific investments are highly valuable. Temporary migrants seek to stay only for a limited period—to work, to obtain an education, to tour, to visit friends. For them, country-specific investments are often much less valuable. For example, a Russian exchange student is likely to value rights much less than a Japanese academic who joins a university faculty and expects to remain in the United States for the indefinite future.

To sum up, in this basic model, migrants who make greater country-specific investments value rights more than migrants who make fewer or no country-specific investments. But all migrants will value rights at least a little. This point can be put another way. Holding the type of migrant constant, a migrant or potential migrant will make greater country-specific investments, the greater the rights protections in the host country.

### B. *Supply Side: What States Want*

When a state grants rights to migrants, it incurs costs. Some of these costs are straightforward. If a migrant has the right to enjoy her property, then the state cannot confiscate her property and distribute revenues to grateful citizens. If a migrant has the right to criminal process, then the state cannot summarily throw her in jail if it suspects she committed a crime or poses a threat to others. Also, the state

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<sup>65</sup> As the discussion below will make clear, uncertainty about the future and changing circumstances is not the only reason migrants might value political rights. They are also valuable as a precommitment device. We discuss precommitment in Part II.C *infra*.

<sup>66</sup> This does not mean that migrants who intend to stay permanently will always want to naturalize as quickly as possible in order to obtain the largest suite of available rights. There are a number of reasons why naturalization can be costly for migrants. See *infra* notes 173–78 and accompanying text (discussing some costs of dual citizenship and of relinquishing citizenship in Sending State).

<sup>67</sup> Of course, migrants who arrive in the host country thinking that their stay is temporary may change their intentions over time.

must divert valuable police and judicial resources to the protection of migrants from citizens who seek to harass them.

Why, then, do states give migrants these basic rights? We could imagine a host country announcing that migrants are welcome but that they have no rights. As a matter of historical practice, this type of situation sometimes occurs.<sup>68</sup> But it is hard to imagine that a host country with such a policy would attract many migrants. A migrant who entered a country where she was given literally no rights would take the risk of being immediately stripped of all her possessions. The government could summarily take all her possessions and enslave or kill her. Ordinary people could do the same, and she would have no ability to call on the government for protection. Thus, a state would attract no migrants—except in highly unusual cases, such as a Wild West situation where people band into groups for protection and try to quickly exploit natural resources—unless it gave migrants at least minimal basic rights. For that reason, basic rights would seem to be a *sine qua non* of migration.<sup>69</sup>

As we noted from the start, all states benefit from migration, but each state has unique needs and interests. Consider a state that needs only seasonal unskilled labor from people who live just across the border. Suppose further that these people would earn a higher wage in the host country than they do at home. Such people, if granted only basic rights, would likely be willing to engage in seasonal migration, to their and the host country's mutual benefit.

Now, let us consider the right to remain. Let us imagine that the host country faces two possible futures: a "good condition," where the current demand for migrant labor continues; and a "bad condition," where the demand collapses because of a crisis, a war, or an

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<sup>68</sup> Descriptions of gold mining in California during the gold rush sometimes have this flavor. See, e.g., JOHN R. UMBECK, *A THEORY OF PROPERTY RIGHTS WITH APPLICATION TO THE CALIFORNIA GOLD RUSH* 4-5 (1981) (describing how property rights emerged in absence of effective legal system during gold rush).

<sup>69</sup> However, as noted above, some basic rights—including the right to choose one's employer, or even to work at all—can be restricted. And historically other basic rights, such as the right to own property, were often restricted. See, e.g., *Oyama v. California*, 332 U.S. 633, 645-47 (1948) (holding unconstitutional California laws that prohibited land ownership by persons ineligible for citizenship, which under naturalization rules at time meant principally Japanese immigrants); Irene Bloemraad, *Citizenship Lessons from the Past: The Contours of Immigrant Naturalization in the Early 20th Century*, 87 *SOC. SCI. Q.* 927, 942-44 (2006) (noting that, from post-founding period through early twentieth century, many states restricted property rights on basis of citizenship); Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 *AM. J. LEGAL HIST.* 152, 155-82 (1999) (discussing early common law restrictions on land ownership by noncitizens); Joshua Weisman, *Restrictions on the Acquisition of Land by Aliens*, 28 *AM. J. COMP. L.* 39 (1980); see also *infra* note 162 and accompanying text.

economic downturn, and local citizens turn against migrants and want them expelled.

If the good condition occurs, then granting the right to remain is relatively cheap for the host country. Under such a condition, although the host country might prefer to remove the noncitizen to satisfy some passing political demand—perhaps reflecting temporary changes in public sentiment or institutional spasms or occasional opportunistic desires to extract revenues from them—the political benefits from such removal are likely to be minimal and hence the cost of the right to remain is low.

But if the bad condition occurs, then granting the right to remain becomes costly. Under such conditions, the host country cannot satisfy popular demand to expel the migrants, and there will be political as well as financial costs from respecting the right to remain.

The host country has little reason to grant the right to remain to the seasonal migrants described above. Those temporary migrants do not value the right to remain very much because they do not intend to remain for long periods and are much less likely to make country-specific investments regardless of the scope of their rights. To put this point more precisely, the joint value of the migration for the migrants themselves and the host country is not maximized from a country-specific investment on the part of the migrants. Accordingly, the host country does not need to grant the right to remain in order to secure the desired level of entry and investment by temporary migrants.

Suppose, however, that a country seeks migrants—skilled or unskilled—who will settle permanently. These migrants, who plan to settle permanently in the host country, will need to learn the language and make other country-specific investments. More precisely, a migrant will obtain the highest return from settling in the host country permanently if she first makes a country-specific investment in learning the local language and culture and continues to make country-specific investments after she arrives. Since she can obtain a sufficient return on her country-specific investment only if she can remain in the host country for as long as she wants, she will want more than basic rights: She will want the right to remain.

The problem for the state is that if it grants migrants the right to remain, it will not be able to remove them if circumstances change and the bad condition occurs. So the state will grant migrants the right to remain only if the expected cost of that right is less than the overall benefit to the state. A migrant might well prefer an absolute right to remain—that is, a right that prevails in the bad as well as in the good condition. But if the states can credibly promise to remove the migrant only in the bad condition, many people will still migrate and

make country-specific investments—just as long as the bad condition is sufficiently unlikely to occur, as in the case of a major war or catastrophe, for example.

Remember that migrants also care about their environment, not just their right to reside in the host country. Basic rights can protect some aspects of their lives, but participation rights give them a way to affect the future bundle of public goods supplied by the government. Thus, participation rights are an important way migrants can improve their well-being in the host country.

For the host country, however, participation rights may enable migrants to influence public policy in a manner that hurts the interests of native citizens.<sup>70</sup> Suppose, for example, that native citizens have a strong preference for maintaining high-quality public parks but that migrants care less about parks and more about the quality of roads. If migrants have participation rights, then they could cause the government to reduce spending on parks and increase spending on roads. Ex ante, native citizens will prefer their country not to grant participation rights to migrants, so as to maintain complete control over public policy.

The state will make the same cost-benefit calculation with participation rights that it made with the right to remain. If more migrants will enter and make optimal country-specific investments when they receive participation rights, such that the gains for citizens (lower taxes, cheaper goods, etc.) are greater than the costs (congestion, adverse public policy, etc.), then the state will grant participation rights to noncitizens.

There is a further consideration here, however. Granting participation rights to migrants may be less costly to citizens when there are relatively few migrants or when migrant political preferences are close to those of citizens. Thus, a state may be more willing to grant participation rights, as opposed to merely granting rights to remain, when the expected migration flows are relatively small or when they consist of people whose values and interests are similar to those of citizens.<sup>71</sup> However, by the same token, those migrants may also value participa-

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<sup>70</sup> By “native citizens” we mean the people living in the host country who have rights at the time that a particular migrant enters.

<sup>71</sup> There is some evidence that governments are, in fact, more likely to enfranchise new groups of voters when those groups are relatively small in comparison to the existing pool of voters. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 419–20 (2005); Sebastian Braun & Michael Kvasnicka, *Men, Women, and the Ballot: Woman Suffrage in the United States* 3–4 (Sonderforschungsbereich 649, Discussion Paper No. 2009-016, 2009), available at <http://sfb649.wiwi.hu-berlin.de/papers/pdf/SFB649DP2009-016.pdf>.



tion rights less because they are not numerous enough to be able to form a meaningful voting bloc.<sup>72</sup>

As an aside, note that states will not be likely to “bribe” people to migrate by offering them significant cash payments because such cash payments will not encourage migrants to make country-specific investments unless the payments are conditioned on those investments, which is likely to be impractical. Instead, states offer migrants legal rights that protect the value of their labor and other aspects of their lives. These rights should encourage migrants to make optimal country-specific investments, as long as they believe that the host country will keep its commitment not to renege on these rights or otherwise reduce the migrants’ payoff.

### C. *The Optimal Content of Migrant Rights*

To evaluate policy choices, we imagine two agents: a migrant and the state. At time 0, the migrant enters the state and has an initial choice to make a country-specific investment or not. The investment is costly but has positive net present value for the migrant as long as she is permitted to stay for a sufficient length of time, during which she can recover the cost by working and earning a wage.<sup>73</sup> The migrant earns a higher wage if she invests than if she does not invest. At the same time, the state benefits from the migrant’s presence because she reduces labor costs and pays taxes.

At time 1, events change. Normally, the state has no reason to expel migrants or change the living conditions of migrants, but let us put this normal condition aside for expository clarity. Let us define the good condition as one in which the state gains by removing migrants or subjecting them to harsher conditions, but the gain is relatively low. The bad condition—a crisis, a war, an economic downturn, an influx of refugees—is the same except the gain is relatively high. The state gains from removing migrants in both conditions, but gains much more in the bad condition.

We assume that from the state’s standpoint the optimal policy at time 0 is one in which the migrant can be removed, or her living circumstances worsened, if the bad condition occurs but cannot be removed or otherwise harmed if the good condition occurs. This is because the state gains more from time 0 taxes than it loses in time 1 if the good condition occurs, but the state gains less from time 0 taxes

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<sup>72</sup> In Part III.C *infra*, we relax this constraint and consider different ways in which participation rights might impose costs on, or in some cases bring benefits to, the host country.

<sup>73</sup> We focus here on financial costs for expository simplicity. However, the model can encompass all sorts of nonmonetary costs and benefits.

than it loses in time 1 if the bad condition occurs. Moreover, the migrant will enter and make a country-specific investment only if she can recover that investment in time 1, and we suppose that she can, in an expected sense, as long as she can stay if the good condition prevails and the probability of the good condition is high enough. Yet she knows that the state will have an incentive to remove her or make her life worse even if the good condition occurs. Thus, in order to encourage migration and investment, the state must commit itself not to remove the migrant and to maintain her living standard in the good condition but not in the bad condition.<sup>74</sup>

Thus, an optimal contract between the host country and the migrant would provide that the host country can remove the migrant if the bad condition prevails but not if the good condition prevails. How might such a contract appear in practice? History suggests two prominent types of bad conditions: war (and other security alarms) and economic downturns. During wars, migrants (especially those from the enemy state) may be suspected of disloyalty and even espionage or sabotage.<sup>75</sup> During economic downturns, native citizens might seek the expulsion of migrants who compete for scarce jobs.<sup>76</sup> The optimal contract therefore might stipulate that migrants can remain in the host country unless a war or economic downturn occurs.

In practice, we tend to observe migration contracts that contain the war condition but not the economic downturn condition. Governments typically retain the right to deport migrants if war breaks out with the country of which they are nationals.<sup>77</sup> Migrants probably understand these rules and indeed, as far as we know, migration between traditional enemies is unusual.<sup>78</sup>

In contrast, it is considerably rarer for countries to reserve an explicit right to deport migrants during economic downturns. Why is this? Economic downturns are hard to define—certainly harder to

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<sup>74</sup> This is the classic problem of time inconsistency, first analyzed in the economics literature by Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473 (1977).

<sup>75</sup> See STONE, *supra* note 64, at 29–30, 283 (noting frequent suspicion of disloyalty of aliens during wartime).

<sup>76</sup> See MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 19–20 (2004) (citing job scarcity as factor leading to immigration restriction).

<sup>77</sup> See, e.g., Alien Enemies Act of 1798, 50 U.S.C. §§ 21–24 (2006).

<sup>78</sup> An important exception is British migration to the United States during the first half of the nineteenth century. This case is unusual and may be explained by the historic ties between the two countries. Moreover, countries sometimes welcome migrants who are fleeing an enemy regime. During the cold war, the United States welcomed, through asylum policies and other mechanisms, dissident citizens of the Soviet Union and its allies.

define than war.<sup>79</sup> If the law provides that governments can remove migrants if an economic downturn occurs, migrants might fear that the government will engineer economic numbers that reflect a downturn or seize on weak evidence to rationalize expulsions. But if the law is more specific, then the government might fear that it will exclude a genuine crisis that does not meet the law's definition. If governments reserved the right to deport migrants during economic downturns, then migrants might not have the security necessary to make country-specific investments and hence might not migrate or might migrate but not invest.<sup>80</sup>

States usually take another tack. Instead of reserving a right to deport under specified economic conditions, governments divide migrants into classes and reserve discretionary rights with respect to one class and not with respect to the other. In the most common arrangement, migrants have limited rights for an initial period of years, stronger rights for a second period of years, and then maximal rights once they become citizens. For example, in the United States, many migrants enter on temporary employment visas that allow them to work for one particular employer but not for anyone else.<sup>81</sup> The visa expires after three or five years, depending on the type of occupation, but can usually be renewed once.<sup>82</sup> At the expiration of the second visa, the migrant may be able to become a lawful permanent resident (LPR).<sup>83</sup> An LPR has the right to change jobs and the (conditional) right to remain indefinitely, but not the right to vote. After five years as an LPR, the migrant gains the legal right to naturalize, whereupon she obtains the right to vote and the other privileges of citizenship.<sup>84</sup> Thus, migrants often enter as part of the initial class with the expectation that if they remain in the country for a certain

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<sup>79</sup> This is not to say that the war condition does not raise any concerns about strategic behavior by the government. Even if it is easy to define the existence of the bad state of war, migrants might still worry that the government will use the war to rationalize deportation or discrimination that is really not related to any security threat. Many have argued that the United States's history is replete with examples of such behavior. See, e.g., STONE, *supra* note 64, at 287–96 (discussing internment of Japanese Americans in World War II).

<sup>80</sup> Note that migrants' uncertainty about the verification process stems both from the difficulty of specifying a clear rule and the worry that the state will interpret any less-than-clear rule it adopts in a self-interested fashion. Third-party verification organizations could in theory be used to reduce the second concern, but we do not observe this in practice.

<sup>81</sup> See INA § 214, 8 U.S.C. § 1184 (2006).

<sup>82</sup> 8 C.F.R. § 214.2(h)(9)(iii)(A), (h)(15)(ii)(B) (2009).

<sup>83</sup> ALEINIKOFF ET AL., *supra* note 26, at 437; cf. INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B) (2006) (exempting H-1B visa holders from general requirement that any recipient of temporary visa have "a residence in a foreign country which he has no intention of abandoning"); 8 C.F.R. § 214.2(h)(16)(i) (2009) (allowing H-1B nonimmigrants to enter on visa and to seek permanent residence simultaneously).

<sup>84</sup> See INA § 316, 8 U.S.C. § 1427.

amount of time, they will be able to make the transition to the higher classes.<sup>85</sup>

From the perspective of our model, these tiered classifications reflect several policy considerations. First, they reflect the government's interest in attracting different types of migrants. Governments classify migrants according to how much the state desires a particular class of migrants, how much the successful migration of a particular class hinges on country-specific investments, and so on. Highly desirable migrants are given more generous rights; less desirable migrants are not. Migrants for whom country-specific investments are crucial are given a more robust right to remain than migrants who value entrance regardless of their ability to recoup any country-specific investment. But even highly desirable migrants do not have the right to freeze in place the government policies that prevailed when they entered; such a right would be much too costly. Occasionally states do give migrants some control over the conditions of their lives by giving them voting rights, as some American states did during the nineteenth century,<sup>86</sup> but in the United States today those rights do not come until naturalization.

Second, the tiered classifications reflect an implicit compromise between the two competing goals of encouraging entrance and country-specific investment, on the one hand, and government flexibility, on the other hand.<sup>87</sup> During an economic downturn, the government can expel short-term migrants, or refuse to renew their visas, thus relieving some of the political pressure from native workers,

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<sup>85</sup> Because migrants are not *required* to make the transition to the higher classes, the rights of migrants do not all increase solely by virtue of the passage of time. The bare passage of time is important for some constitutional rights, such as procedural due process rights. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32–34 (1982) (noting that noncitizen's due process rights grow as she “begins to develop the ties that go with permanent residence”). It is also important for some statutory rights, such as the right to cancellation of removal. See INA § 240A(b), 8 U.S.C. § 1229(b) (“The Attorney General may cancel removal of [a deportable alien] if the alien . . . has been physically present in the United States for a continuous period of not less than 10 years . . .”). But other rights are structured as options that the migrant acquires over time. If the migrant chooses not to exercise her option—say, by not naturalizing—she will not acquire the additional rights.

<sup>86</sup> See *supra* text accompanying notes 47–52.

<sup>87</sup> An additional possibility relates to immigrant screening. An interesting feature of this progressive accumulation of rights is that the migrant has a weaker incentive to make country-specific investments initially, but the incentive strengthens over time. Correlatively, the Receiving State's flexibility decreases over time. One plausible explanation for this arrangement is that the Receiving State obtains better information about the migrant over time. It is optimal for the state to have flexibility when little is known about the migrant; the state can cede flexibility as it becomes increasingly clear that the migrant poses no threat and has integrated effectively. See Cox & Posner, *supra* note 10, at 824–35 (discussing costs and benefits of ex ante versus ex post screening of immigrants).

while allowing long-term migrants to stay, thus encouraging some degree of country-specific investment by future migrants. The legal rights relating to transition are consistent with this compromise.

In the United States, for example, migrants have no formal right to make the transition from their status as a temporary worker—say, on an H-1B visa—to LPR status.<sup>88</sup> This lowers the cost to the government of deciding during an economic downturn to cut off these migrants' access to LPR status.<sup>89</sup> In contrast, the government lacks legal discretion to deny naturalization to LPRs who satisfy the residency requirement and a few other requirements.<sup>90</sup>

A further point is that even in the bad condition, migrants enjoy basic rights—for example, they may keep their property. Thus, from an *ex ante* perspective, migrants expect to retain at least some, even if not all, of their expected gains. This compromise reflects the fact that governments care most about eliminating security threats or labor unrest in the bad condition, and can probably obtain little value by confiscating migrants' property when migrants can remit money to relatives overseas and in most cases do not accumulate much in the first place. Basic property rights in the bad condition give the migrants at least some incentive to make country-specific investments, without interfering with the government's flexibility where it most needs it.

Our model suggests other ways in which the optimal migration contract could be designed. Suppose, for example, that the host country retains the right to expel the migrant only upon payment of some large sum to the migrant. The migrant might be willing to make the country-specific investment knowing that even if she can be expelled, she will be compensated to a degree for her investment.<sup>91</sup> The country retains flexibility and, if the demand for entry is high enough, could even offset the cost by requiring the migrant to pay fees

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<sup>88</sup> Cf. ALEINIKOFF ET AL., *supra* note 26, at 437 (discussing formal legal distinction between nonimmigrants and immigrants and describing way in which immigration system has come in recent years to treat nonimmigrant admissions more like transition model described above than like entirely separate track).

<sup>89</sup> In fact, during the current financial crisis there have been calls in Congress for significant restrictions on the H-1B visa program. Laura Crimaldi, Editorial, *Walls Closing on All Sides for Immigrants: Economic Crisis, Crackdown Hit Community Hard*, BOS. HERALD, Feb. 22, 2009, at 6. *But see Hire Power*, N.Y. DAILY NEWS, Feb. 23, 2009, at 24 (arguing that restriction of H-1B visas will hurt financial sector).

<sup>90</sup> See INA §§ 311–331, 8 U.S.C. §§ 1422–1442 (2006) (detailing eligibility and requirements of naturalization). Whether naturalization is discretionary or a matter of right is an important design decision about which the United States has long taken a quite different approach than most of Western Europe.

<sup>91</sup> Options play an important role in the design of optimal contracts. See, e.g., BOLTON & DEWATRIPONT, *supra* note 9, at 566–69 (describing role of options in optimal contracts).

upon entry. Such a system would approximate an insurance scheme, where the migrant in essence purchases an insurance policy upon entry—a policy that pays out if the bad condition occurs and the migrant is required to leave.

We do not observe such a system, though close variations have recently cropped up. Spain, which absorbed large numbers of low-skilled migrants during a decade-long economic boom, has recently begun offering those migrants cash if they leave the country.<sup>92</sup> While the cash-for-leaving policy is structured as an option rather than a requirement, it reflects the same basic logic: Spain can remove migrants today while setting a precedent that encourages future migrants to make country-specific investments when the economy recovers.<sup>93</sup> This also suggests an additional wrinkle on our earlier discussion of precommitment. Spain may have been legally authorized to revoke these migrants' work visas, but doing so might have made future migrants more wary about immigrating to Spain or investing after they arrived. A state that has the legal right to deport migrants during economic downturns but routinely refrains from exercising that right may in this way establish a reputation for allowing migrants to stay. Such a reputation can serve as a precommitment mechanism that encourages migrants to enter and invest.<sup>94</sup>

Finally, states may try to compromise their need for flexibility and the migrant's interest in security by granting voting rights to migrants. Voting rights give migrants the power to form coalitions that can block adverse legislation but, as long as migrants remain in

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<sup>92</sup> Christine Spolar, *Spain Tries To Buy Out Immigrants*, CHI. TRIB., Oct. 13, 2008, at 7; see also *Czech Republic To Pay Unemployed Foreign Workers To Go Home*, REUTERS, Feb. 9, 2009, <http://www.reuters.com/article/worldNews/idUSTRE5185Y920090209> (noting Czech government's offer to pay plane fare for foreign workers unable to pay for their own return).

<sup>93</sup> The Spanish policy is also likely driven by the fiscal consequences of retaining the low-skilled migrants. During the last decade, Spain frequently regularized the status of irregular workers and extended the social safety net to cover large numbers of immigrant workers, in part to encourage their integration. As Spain's economy soured, however, these migrants' eligibility for public assistance increased the state's fiscal burden. Spain then offered many of the migrants lump-sum payments of a fraction of their unemployment benefits in exchange for promises that the migrants would leave the country and not return for at least three years. Spolar, *supra* note 92.

<sup>94</sup> See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 100–04 (2005) (surveying reputational theories); Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231, 259–66 (2009) (discussing types of state reputation). The power of a state's reputation depends on migrants having information about the state's past practices and believing that the state will behave consistently across time. The United States has a long history of deporting migrants during economic downturns. The mass deportation of Filipinos and Mexicans (and Mexican-Americans) that took place during the Depression is one prominent example. NGAI, *supra* note 76, at 120–26. But it is far from certain that these historical episodes influence migrants' behavior today.

the minority, not enough power to block adverse legislation that is overwhelmingly in the interest of natives. If natives cannot form powerful anti-migrant coalitions in the good condition, but can in the bad condition, then voting rights may have the same effect as the optimal contract.<sup>95</sup>

The arrangements we have discussed are sensitive to shifts in the underlying variables. Consider first our claim that a war is more easily verifiable than an economic downturn. This may well be true in general but there are telling exceptions. The current conflict with Islamic extremists falls somewhere between a true war and a law enforcement operation. In the wake of 9/11, the U.S. government did not expel large numbers of migrants from Arab and Muslim countries with heavy Al-Qaida presence, but it did subject these migrants to intrusive monitoring programs.<sup>96</sup> These programs may well have seemed to Arabs and Muslims to be a breach of their implicit migration contract with the United States. Yet, for the U.S. government, a change in circumstances justified a change in the law. However one looks at it, migrants from the relevant countries will be more reluctant to enter the United States and to make country-specific investments.<sup>97</sup> The U.S. government's response has introduced uncertainty, which makes the war condition more like the economic downturn condition, possibly leading to an outcome where few or no migrants enter and invest.

To sum up, the optimal migration contract will provide that the government may deport migrants if the bad condition occurs. However, if the bad condition is unverifiable, then the government has three options: It may retain discretion to remove the migrant, it may alter the migrant's living conditions, or it may give up that discretion or the bulk of it. We observe the intermediate solution—the alteration of the migrant's living conditions—most clearly in the security

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<sup>95</sup> We discuss this argument in more detail in notes 74–91 and Part III.C *infra*.

<sup>96</sup> DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 47–56 (2003); Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alien a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 620–32 (2005); Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 413–14 (2004); Lawrence M. Lebowitz & Ira L. Podheiser, *A Summary of the Changes in Immigration Policies and Practices After the Terrorist Attacks of September 11, 2001: The USA PATRIOT Act and Other Measures*, 63 U. PITT. L. REV. 873, 880–81 (2002) (describing post 9/11 visa waiting period imposed on residents of Arab countries).

<sup>97</sup> Indeed, there are anecdotal accounts of Muslim immigrants choosing other destination states, like Canada, over the United States because of this uncertainty. Telephone Interview with Ahilan Arulanantham, Staff Attorney, Am. Civil Liberties Union of S. Cal. (Feb. 17, 2009).

context. In other circumstances, we observe governments dividing people into classes with varying levels of protection. This results in many migrants not making country-specific investments. The migrants that decide to make country-specific investments do so either because they receive protection immediately or are willing to risk removal at time 1 in the hopes of obtaining protection and a return on their investment in later periods.

When the underlying variables change, so should the law, and here we can offer some rough predictions. If the technology for verifying good and bad conditions changes so that verification becomes difficult, then governments will choose an extreme outcome—our Al-Qaida example, in which the government is unable to specify in advance clear rules for identifying the sort of terrorist threat that would trigger deportation or harsher treatment of some immigrants. If the risk of the bad condition increases, then migrants' rights should become weaker. And if the value of country-specific investments increases—as might happen as a country moves from an agricultural or traditional market economy to a “knowledge-based” economy—then migrants' rights will become stronger.

#### *D. The Optimal Strength of Migrant Rights*

The optimal contracting problem has an additional dimension not present in ordinary contractual relations, where it can be assumed that courts will enforce the contracts to which parties agree. Even if it were possible to describe precisely the good and bad conditions, prospective migrants may worry that the state will renege on its obligations under the agreement. For example, the state might retroactively change deportation law in a way that makes many noncitizens removable even in the good condition. Or, short of deportation, the state might harass the migrants or otherwise make their lives miserable, akin to constructive firing in the employment setting. This raises the problem of the strength of rights, or, more precisely, their degree of entrenchment.

Consider the difference between statutory and constitutional rights. If migrants are given an absolute right to remain and this right is statutory, then the state can eliminate this right merely by changing the law. Now, in fact, it might be difficult to change the law, in which case the right is robust. But, it might also be easy to change the law.

Alternatively, the right could be constitutional. If the right is constitutional, it can still be changed, but doing so is more difficult. It should be clear that generous rights (such as an absolute right to remain) that are weakly entrenched may offer less protection than



weaker rights (such as a right to remain unless there is a war) that are more strongly entrenched.

The three main sources of rights can be arranged from weakest to strongest. Repeal of administrative rights can occur at the behest of the executive alone.<sup>98</sup> Repeal of statutory rights requires the participation of Congress. Repeal of constitutional rights requires the satisfaction of various supermajority rules<sup>99</sup> or the acquiescence of the courts. All else equal, entry and country-specific investment will be greater when rights are more highly entrenched than when they are not. By the same token, the flexibility of the state is reduced. If the state fails to anticipate a crisis or type of crisis, and thus does not incorporate an option to remove into the basic legal scheme, it will not be able to add such an option if the right to remain is sufficiently entrenched.

Now consider a different possibility: giving the migrant the right to vote. The right to vote is distinctive. Like the right to remain, it can (in principle) be statutory or constitutional, and thus can be easier or more difficult for other (citizen) voters to eliminate. Yet, the migrant herself can exercise her right to vote and use it to elect officeholders who will support the migrant's rights. Thus, the right to vote is, to a degree, self-entrenching. To be sure, it is worth little by itself; but if there is a critical mass of migrants, the right to vote can be powerful.

Unlike the right to remain, the value of the right to vote is a function of how many other migrants have that right and how native citizens are likely to exercise their own votes. If few other migrants in the host country exist or few have the right to vote, or if native citizens make up a large majority and vote in blocs, then a migrant is not likely to value the right to vote. But in many cases, migrants will be able to form blocs<sup>100</sup> and make coalitions with groups of native citizens. This will allow migrants to protect whatever interests they value the most. Thus, participation rights can have distinctive value as a mechanism for overcoming immigration law's precommitment problem.

How might host countries choose whether to protect the rights of migrants administratively, statutorily, constitutionally, or through voting rights? Our starting point—that many migrants gain from making country-specific investments but that host countries want the

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<sup>98</sup> See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. (forthcoming 2009) (manuscript at 2–4, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1356963](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1356963)) (describing extent of President's authority in immigration policy).

<sup>99</sup> See U.S. CONST. art. V.

<sup>100</sup> See *infra* text accompanying notes 123–25.

flexibility to remove migrants if the bad condition occurs—suggests that some level of protection less than absolute will prevail. Let us assume a baseline where the host country simply exercises administrative discretion and can retain or remove migrants at will. Migrants might fear that the executive will remove them for political reasons even when the bad condition does not occur and thus will refrain from making country-specific investments. How might a host country improve on this outcome?

First, a host country might pass a statute that provides for fully secured rights. If migrants expect judges to interpret the statute fairly, and if the legislature can repeal the statute only with great difficulty—for example, only if an emergency (the bad condition) exists—then the statute might be an adequate solution. However, the legislature itself might be no more trustworthy than the executive.

Second, a host country might constitutionalize the statute, thus eliminating the ability of the legislature to overturn it. A host country will do this if it expects that it can amend the constitution in an emergency or (what is more likely) that courts will fairly carve out exceptions for emergencies. Migrants would also need to trust the courts.

Third, a host country might instead grant the migrant voting rights, thus giving her the ability to block self-serving interpretations by the government or statutory revisions by the legislature. As we noted above, a host country will most likely grant voting rights to migrants who share the basic values and preferences of native citizens. Migrants will be most likely to value these rights if they believe they can form a coalition that is large enough to protect their interests.

In the United States, the rights of long-term migrants to remain have, over the centuries, become to a limited extent constitutionalized. Yet, these constitutional rights remain minimal and mostly procedural rather than substantive.<sup>101</sup> For example, Congress is free to pass statutes requiring the deportation of long-term residents on almost any basis and to apply these new deportation rules retroactively.<sup>102</sup> At the same time, the Executive has gained increasing control over the rights of migrants, especially in the form of enforcement

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<sup>101</sup> See *supra* notes 32–34.

<sup>102</sup> See *Galvan v. Press*, 347 U.S. 522, 530–31 (1954) (upholding retroactive application of deportation provisions of Subversive Activity Control Act); *Fong Yue Ting v. United States*, 149 U.S. 698, 721–22 (1893) (holding that federal government has broad power to deport any noncitizen); see also *Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)*, Pub. L. No. 104-208, 110 Stat. 3009, 3009–546 (codified as amended in scattered sections of 8 U.S.C.) (making many retroactive changes to grounds of deportability); *INS v. St. Cyr*, 533 U.S. 289, 314–26 (2001) (discussing IIRIRA's retroactive application).

actions against migrants who have entered illegally.<sup>103</sup> Thus, the strength of migrant rights in the United States varies according to the type of migrant and the type of right in question, and, as our model predicts, the rights of short-term migrants are weaker—that is, easier to change.

To sum up, migration policy presents a precommitment problem for the host country. The host country seeks to encourage migrants to enter and make country-specific investments so that it can obtain greater tax revenues and other benefits. At the same time, the host country has a strong interest in being able to remove migrants, or significantly reduce the quality of their living circumstances, *ex post*.

If the content of rights could be perfectly specified in advance—so that the host country could take adverse actions against migrants if and only if doing so was socially optimal for citizens from an *ex ante* perspective—then the rights should be the strongest possible. But because rights cannot be perfectly specified in advance, the host country faces a second-order trade-off between granting weak rights (so that it can change them at will but with the result that migrants will be reluctant to invest) and strong rights (so that migrants will invest but the host country will not be able to change those rights when doing so is optimal).

We can again offer some predictions. When verification costs are low so that host countries can offer detailed contracts that specify migrant rights under different conditions, the strength of rights should be high. When verification costs are high, however, host countries will offer stronger rights (for example, statutory rather than administrative) to migrants who make optimal country-specific investments than to migrants who do not. In the United States, skilled workers who enter on visas have statutory rights while unskilled workers who enter illegally have quasi-administrative rights that exist at the sufferance of the executive.<sup>104</sup>

### III COMPLICATIONS

We just outlined a basic model with potentially testable predictions. The real world is more complex, however, and here we suggest some ways for complicating the analysis.

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<sup>103</sup> See Cox & Posner, *supra* note 10, at 852.

<sup>104</sup> See *id.* at 849–52 (discussing *de facto* low-rights system of illegal entry); Cox & Rodríguez, *supra* note 98, at 63–65 (arguing that Executive has broad and unilateral powers over illegal immigrants).

### A. *Exit Rights*

All migrants have the right to exit. In our basic model, this right is irrelevant because the problem on which we focus is that of the precommitment of the host country. But one can imagine the opposite problem, namely, that countries fear that if they welcome migrants and incur costs in training, educating, and assimilating them (for example, by offering bilingual programs in schools), the migrants may leave the country before working and paying enough taxes to allow the host country to recover its investment.

If this problem were real, host countries could deny migrants the right to exit or require migrants to post a bond before they enter, which they would lose if they voluntarily left the country before a specified period of time had expired. In practice, no modern democracy formally limits migrants' (or citizens') exit rights, and we do not observe the bonding system.<sup>105</sup> This suggests that the problem is theoretical rather than real. Nonetheless, some countries do require migrants to repudiate their citizenship in other countries before accepting citizenship in the host country.<sup>106</sup> This requirement reduces the value of the exit option, as the exiting migrant would need to reapply for citizenship in her native country or go elsewhere. We will discuss dual citizenship in greater detail in Part IV.B.

If migrants have the right to exit, the value of that right varies greatly depending on the nature of the migrant and the country of origin. Migrants from high-wage countries have more valuable exit rights than migrants from low-wage countries because the latter lose more future income if they leave the host country. Refugees also have higher exit costs: If they return to their native country, they may be harassed or killed. One might predict that host countries would offer weaker rights to migrants with low-value exit options because the host

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<sup>105</sup> To be clear, by "exit rights" we mean the legal right of the immigrant to return to her home country. There are many other reasons that noncitizens might physically exit the host country: They might travel abroad on vacation, or they might travel back to their home country to visit family and friends. These forms of temporary travel abroad do not raise the concerns we focus on in this section. But we should note that the United States does, as a functional matter, impose some restrictions on these travel rights. See Nancy Morawetz, *The Invisible Border: Restrictions on Short-Term Travel by Noncitizens*, 21 GEO. IMMIGR. L.J. 201, 205–19 (2007) (describing current travel restrictions imposed on LPRs and applicants).

<sup>106</sup> See Patrick Weil, *Access to Citizenship: A Comparison of Twenty-five Nationality Laws*, in CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 17, 22–24 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001) (listing European countries that have renunciation requirement); Simone Tan, Note, *Dual Nationality in France and the United States*, 15 HASTINGS INT'L & COMP. L. REV. 447, 461–62 (1992) (noting that France's Nationality Act of 1973 departed from Code of 1945's requirement that French citizenship must be abandoned upon acquiring citizenship of another state).

country need not fear that such migrants will leave if they are treated poorly and thus can depend on these migrants to make country-specific investments despite fewer and weaker rights. One observes this pattern of regulation in the United States, where high-skilled workers from prosperous nations in Europe and elsewhere are often accorded substantial legal rights, while low-skilled workers from much poorer nations in Central and South America are admitted on restrictive terms or permitted to enter without any legal status at all.<sup>107</sup>

### B. Families

Our basic theory assumed just two agents: a monolithic state and a solitary migrant. But migrants are seldom solitary. States can encourage migrants to enter and invest by promising rights to family members, such as children. As before, however, the state risks tying its hands in a way that may hurt it *ex post*.

Sending and Receiving States face similar choices with respect to the treatment of family members. A migrant may have any number of familial relationships, current (as of the time of migration) and prospective (after migration). Let us distinguish a few dimensions. First, at the time of arrival, the migrant may have many or few relatives, each of whom may be close or distant. Second, she may bring these relatives (some or all) with her or they may stay in the Sending State. Third, she may establish new familial relationships in the Receiving State—in particular, a spouse and children (but also in-laws, nephews, nieces, and so forth). Fourth, her new relations may have stronger or weaker connections with the Receiving State (they might be non-citizens, for example). The Sending and Receiving States must make numerous choices about how to treat these familial relations and, therefore, about how to treat the migrant herself, given that the migrant will care about maintaining these relationships and (usually) staying in proximity to her family.

We can speak broadly of favorable family policies or unfavorable family policies, where the degree of favor refers to the extent to which the migrant may exercise an option to enter with pre-entry family connections and to exit with post-entry family connections. To keep things simple, however, let us focus on perhaps the most important issue from the standpoint of policy: the rights of children.

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<sup>107</sup> See Cox & Posner, *supra* note 10, at 849 (describing “multi-‘track’ structure of American immigration law”). Refugees are an exception in the United States. They are formally provided generous rights, including legal status and the right to eventually become LPRs. See INA §§ 208–209, 8 U.S.C. §§ 1157–1159 (2006) (describing asylum requirements and legal rights of noncitizens granted asylum).

Consider a migrant who enters a Receiving State and then has a child while in that country's territory. The basic conceptual divide is between *jus sanguinis* and *jus soli*.<sup>108</sup> *Jus sanguinis* provides that a child derives her citizenship from her parents, so a child of German citizens who is born in the United States has German citizenship.<sup>109</sup> *Jus soli* provides that the child derives her citizenship from the state in whose territory she is born, so the child in our example would have United States citizenship.<sup>110</sup> Actual laws deviate from these paradigms, and various rules resolve conflicts or permit dual citizenship, but we will limit ourselves to the paradigm cases.<sup>111</sup>

What are the costs and benefits of the two systems? For the migrant, a host country with *jus soli* is more attractive than a country with *jus sanguinis* because only in the former can her child, if born in the Receiving State, have Receiving-State citizenship. Given that a child who is born and spends several years in the Receiving State will generally be a fluent speaker of that language and may have trouble learning the language of the Sending State, the migrant's interest in obtaining citizenship for her child may be strong. To be sure, this citizenship might not be worth anything if the migrant and her children leave the Receiving State. Even in that case, the option to return has value because it protects the migrant from adverse developments in her home country.<sup>112</sup> But, compared to *jus sanguinis*, *jus soli* gives the migrant the option to obtain citizenship for her children if she decides to remain permanently in the Receiving State, so that her children, as adults, may stay as well.

At the same time, the migrant will prefer to have a system of *jus sanguinis* in the Sending State. This ensures that if she decides to return, then her children will be able to return with her and reside permanently as citizens of the Sending State.<sup>113</sup>

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<sup>108</sup> Weil, *supra* note 106, at 17.

<sup>109</sup> RUTH DONNER, THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW 31–33 (2d ed. 1994).

<sup>110</sup> *Id.*

<sup>111</sup> We discuss the variations in citizenship rules more fully in Part IV.B *infra*.

<sup>112</sup> In theory, the children's citizenship in the Receiving State may be limited by Sending State rules. For example, the Sending State could confer citizenship on the child under principles of *jus sanguinis* and refuse to recognize the citizenship conferred by the host country. In practice, however, we do not observe such restrictions.

<sup>113</sup> This point applies with diminishing force as generations pass. The migrant probably thinks very little about the rights of her great- or great-great-grandchildren. Many states—including the United States—have a generational cutoff. *See, e.g.*, INA § 301, 8 U.S.C. § 1401 (2006) (limiting citizenship outside of United States to those who have American parent). But a state is less likely to have such a cutoff if it identifies strongly as a diaspora nation founded on a shared ethnic or religious identity. Such states will want to extend citizenship even to the remote descendants of citizens in order to encourage their entry. In that light, it is unsurprising that Israel permits distant descendants of citizens to enter the

Consider now the Receiving State's perspective. With respect to immigrants, it encourages immigration and country-specific investment by adopting *jus soli*. Immigrants are more likely to enter, and to invest in country-specific assets, if they expect that the children whom they bear in the Receiving State will be citizens. There is some evidence that the United States adopted a *jus soli* regime in part for these reasons—it was a fledgling nation with vast tracts of land and a strong interest in attracting labor.<sup>114</sup>

The cost of *jus soli* is that these children will have voting rights and the right to remain. Often this cost is very low. The children of immigrants tend to easily learn the language of the Receiving State and adopt the values and absorb the culture of the people who live there. However, in countries where assimilation is difficult, the cost could be very high. The Receiving State might fear that descendants of migrants will form an unassimilated and hostile group; and if the group has voting power, it may distort political outcomes away from what is preferred by native citizens and their descendants.

If the Receiving State fears such an outcome, it will prefer *jus sanguinis*, even though *jus sanguinis* will deter immigration. Indeed, if *jus sanguinis* laws do not deter immigration, they can create a self-fulfilling prophecy where migrants teach their children the language, culture, and values of the migrants' country of origin so that the children will have a viable exit option, in which case these children may not learn the Receiving State's language, culture, and values well enough to allow them to fully assimilate. It may not be a coincidence that *jus soli* prevails in the United States, which has a successful history of assimilation, while *jus sanguinis* has historically prevailed in European countries such as Germany and France, which have unassimilated national minorities. This said, the direction of causality is unclear.<sup>115</sup>

The Sending State can choose to benefit the emigrant by creating a system of *jus sanguinis*. If *jus soli* prevails, the emigrant's foreign-born children will not have their parent's country-of-origin citizenship. This lowers the value of the emigrant's option to exit the Receiving State. By contrast, if *jus sanguinis* prevails in the Sending State, the

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country and quickly become Israeli citizens. See Yousef T. Jabareen, *Constitution Building and Equality in Deeply-Divided Societies: The Case of the Palestinian-Arab Minority in Israel*, 26 WIS. INT'L L.J. 345, 368–69 (2008) (detailing Israel's Law of Return, 5710-1950, 4 LSI 114 (1949–50) (Isr.), Nationality Law, 5712-1952, 6 LSI 50 (1951–52) (Isr.), and Entry into Israel Law 1952 5712-1952, 6 LSI 159 (1951–52) (Isr.)).

<sup>114</sup> Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 8–9 (1984).

<sup>115</sup> See Weil, *supra* note 106, at 19–25 (describing this historical pattern).

emigrant can be sure that her children will be citizens in that state. Thus, the Sending State might use a system of *jus sanguinis* to encourage emigration and *jus soli* to discourage emigration.

However, it should be clear that states need not have the same system for emigrants and immigrants. A country that seeks to encourage both immigration and emigration, for example, could have *jus soli* for immigrants and *jus sanguinis* for emigrants. This is, in fact, close to the practical effect of United States citizenship policy, which combines elements of both *jus soli* and *jus sanguinis*.<sup>116</sup>

Various rules can also be used to soften the edges of the paradigm regimes. A *jus soli* state, for example, might allow a returning migrant to obtain citizenship status for children born overseas with lesser hurdles, such as shortening waiting periods, lowering fees, and so forth. And, indeed, since World War II, countries with historically different migration law traditions have been gradually converging toward a system that combines elements of *jus soli* and *jus sanguinis*.<sup>117</sup>

Our point, for now, is that what one might call “child-citizenship rights”—*jus soli*, *jus sanguinis*, and the variations—are similar to basic rights, participation rights, and the right to remain, but with an additional twist. Like the other rights, child-citizenship rights are used by the Receiving State to attract migrants and encourage investment, and granting these rights will be particularly favored by the Receiving State when assimilation can be expected. The twist is that child-citizenship rights can also be used by the Sending State to increase or reduce the value of the exit option of its citizens living in foreign states.

### C. Voting Rights

Our simple model above assumed that the cost to the Receiving State of political participation by migrants stemmed exclusively from their potentially divergent preferences. The truth is more complicated. From the Receiving State’s perspective, there are several different reasons why it might be costly to extend voting rights to migrants.

Consider first the problems of information and inculcation. The host country might worry that voters need certain information to cast intelligent ballots; without that information voters might vote in ways that are detrimental to the state and perhaps even to themselves. The concern is that new immigrants do not have sufficient information.

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<sup>116</sup> See ALEINIKOFF ET AL., *supra* note 26, at 15–55 (describing elements of *jus soli* and *jus sanguinis* traditions in U.S. law).

<sup>117</sup> See Weil, *supra* note 106, at 25–32 (describing recent convergence of laws).



The inculcation issue is related: The state might worry that new immigrants will vote in ways detrimental to the existing polity because they will initially not have absorbed the values of the existing community.

Both of these concerns track parallel arguments in American voting rights jurisprudence. As recently as the 1960s, several states (and some local governments) had durational residency requirements for voting.<sup>118</sup> New residents were ineligible to vote until they had resided in the state for a fixed period, sometimes up to one year. When these laws were challenged in court, the states defended them on information and inculcation grounds. These arguments were squarely rejected by the Supreme Court.<sup>119</sup> But the Court did not suggest they were implausible. Instead, it concluded as a normative matter that demanding inculcation was impermissible where inter-local or interstate, rather than international, migration was at stake.<sup>120</sup>

The informational and inculcation issues are both transitional concerns. They suggest that the cost of conferring political rights on a migrant might decline over time. If these were the only costs, they could be alleviated through durational residency requirements—such as the current five-year-residency requirement prior to naturalization—or by other mechanisms designed to lower information costs or to reshape migrants' preferences.

But even if migrants all had good information and fixed preferences, the Receiving State might worry that those preferences diverged from the existing polity in a way that imposed costs on the state. Importantly, however, this does not mean that the Receiving State need always strive to pick migrants with political preferences close to those of existing citizens.

If politics is driven by the median voter, for example, then the state need only ensure that extending voting rights to migrants does not move the median. The Receiving State could accomplish this in one of two ways. First, it could grant voting rights only to migrants whose preferences are close to that of the existing median voter. Second, it could extend the franchise to migrants with diverse prefer-

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<sup>118</sup> For example, the Tennessee Constitution stated that [e]very person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein such person may offer to vote for three months, next preceding the day of election, shall be entitled to vote for . . . members of the General Assembly and other civil officers for the county or district in which such person resides . . .

TENN. CONST. art. IV, § 1 (1970), *invalidated by* *Dunn v. Blumstein*, 405 U.S. 330 (1972).

<sup>119</sup> See generally *Blumstein*, 405 U.S. 330; *Carrington v. Rash*, 380 U.S. 89 (1965).

<sup>120</sup> See *Blumstein*, 405 U.S. at 357–60 (implicitly rejecting state's attempts to enforce requirement that electorate be informed).

ences, so long as it ensured that these migrants' preferences were distributed roughly equally around the median preference of the existing polity.

On this account, the cost of migrant voting is a function of the median migrant's voting preferences but not of the overall diversity of migrants' views.<sup>121</sup> Homogeneity itself is relatively unimportant—and can actually increase the cost of error for the state if it misjudges the preferences of the migrants it picks.<sup>122</sup>

On a related note, it is not just migrant voters' preferences that will concern the Receiving State. Governments are powerful agents of redistribution. This raises the concern that migrants—even migrants who have ideological preferences identical to existing citizens—might try to use their political power to redistribute the state's wealth to themselves. If this is the state's central concern, then it will worry more about the organizational capacities of the immigrant pool than about their ideological distribution. Migrants who can more easily overcome collective action problems and band together as a group will be more likely to engage in successful rent seeking.<sup>123</sup>

Shared cultural, ethnic, or linguistic identity might be features that facilitate such collective action. Consider, for example, the Cuban immigrant community, whose political power has been widely documented.<sup>124</sup> Thus, a state concerned most about rent seeking

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<sup>121</sup> As a technical matter, the cost is also a function of the size of the migrant pool. If the median migrant's preferences diverge from the existing electorate, the extent to which this will actually shift the Receiving State's policies depends on the relative size of the existing polity and the pool of potential migrant voters.

<sup>122</sup> There are, however, other theories that imply that the Receiving State might favor homogeneity in the electorate. Governments produce public goods. A trope of local-government literature is that the efficiency of public good production can be improved by increasing the homogeneity of the electorate. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418–20 (1956) (modeling supply of local public goods). This can be true where there are economies of scale associated with public good production, or where supplying one public good interferes with supplying another, which could be true because the goods themselves are in conflict, as with open spaces and highways, or because the production of public goods is costly, and the government is fiscally constrained. If the efficient supply of public goods were all one cared about, then one would want to use immigration law to increase the homogeneity of the electorate. While this might be a plausible account for very small states, it seems implausible for a large and diverse state like the United States.

<sup>123</sup> See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971) (describing conditions that facilitate and inhibit collective actions).

<sup>124</sup> See, e.g., Samuel Issacharoff, *Groups and the Right To Vote*, 44 EMORY L.J. 869, 898 (1995) (discussing Cuban-American political power in Florida).

might try to limit large-scale migrations from a single source and to pick migrants with diverse ethnic and linguistic backgrounds.<sup>125</sup>

As should be clear from the examples above, different theories about the structure and function of democracy lead to quite different, often conflicting, prescriptions. For example, a government concerned about producing public goods efficiently might favor a homogeneous migrant pool, but a homogeneous migrant pool is the last thing a government concerned about rent seeking would want.

Understanding more fully the political implications of immigration policy highlights a potential tension in a state's immigrant-selection system. States select immigrants along several dimensions. Labor is one important dimension: States often select immigrants who promote particular labor market goals. In the United States today, this might mean admitting a large number of low-skilled workers. But the state's selection preferences regarding the labor market might conflict with the state's ideological selection preferences.<sup>126</sup> Low-skilled workers might turn out to have ideological preferences far from those of the existing electorate. Where this is true, the state must either compromise along one of these dimensions or attempt to avoid the compromise by admitting the immigrants while excluding them from participation in the political process.<sup>127</sup>

This trade-off might help explain why the United States today is contemplating the use of temporary migration programs (which really means a slow path to permanent residence and eventual voting) for low-skilled workers but a much quicker path for high-skilled workers. The comprehensive reform legislation that failed to make it out of Congress in 2006 reflected this structure.<sup>128</sup> Several versions of that legislation combined a large increase in the green-card quota for high-skilled workers with the creation of a large-scale temporary worker

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<sup>125</sup> The United States's quota system includes some such limits. Per-country caps limit the number of migrants from each Sending State who may receive visas. For most states these restrictions are irrelevant, but they impose tremendous restrictions on migration from places like Mexico and the Philippines. See INA § 202, 8 U.S.C. § 1152 (2006) (setting per-country caps); see also ALENIKOFF ET AL., *supra* note 26, at 308–11 (describing per-country caps and effect they have on China, India, Mexico, and Philippines); 9 U.S. DEP'T OF STATE, VISA BULL. NO. 4, at A.5 (2009), [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_4406.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_4406.html) (showing current backlogs created by caps).

<sup>126</sup> See generally Francisc Ortega, *Immigration Quotas and Skill Upgrading*, 89 J. PUB. ECON. 1841 (2004) (modeling trade-off between labor and electoral effects of migration).

<sup>127</sup> This also suggests that, on the margin, states will be more likely to try to attract ideologically dissimilar immigrants with other forms of protection, such as a stronger right to remain.

<sup>128</sup> Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. tits. IV, V (2006).

program for low-skilled workers.<sup>129</sup> The high-skilled workers given green cards and admitted as LPRs would have been eligible to naturalize in five years.<sup>130</sup> In contrast, the low-skilled workers would have had to work for at least three years (and typically longer) before becoming eligible to apply for lawful permanent residence, and their applications would be further delayed if they were unable to pass English and civics exams from which the high-skilled migrants were exempt.<sup>131</sup> This would mean that low-skilled workers would have to wait nearly twice as long as high-skilled workers (under the best of circumstances) to obtain political rights. One explanation of this differential treatment is that the government believed that high-skilled workers would be more likely—because of their countries of origin and high levels of education, among other reasons—to have ideological preferences closer to those of the existing U.S. electorate.

The European Union (EU) presents another interesting example. Article 19 of the Treaty Establishing the European Community (EC) gives every citizen of the EU the right to vote in municipal elections wherever she is a resident.<sup>132</sup> A Pole living in Paris can thus vote in Paris's mayoral elections. But, she cannot vote in French parliamentary or presidential elections. The rules clearly reflect the EU's goal of European integration—to strengthen incentives for workers to move to places where their labor is most highly valued. The EC Treaty increases the migrant's incentive to make country-specific investments by giving her the ability to form political coalitions that can block policies that harm her. At the same time, the rules implicitly recognize that foreigners do not share all of the values and interests of nationals, and hence the rules limit the ability of foreigners to affect policy by depriving them of the vote at the national level.

#### D. *The Role of Employers*

As noted above, many U.S. employment visas permit the migrant to enter only with the sponsorship of an employer. The migrant can remain in the country only as long as she continues to work for that

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<sup>129</sup> See *id.* tit. V (raising employment quota that goes mostly to high-skilled workers from 150,000 to 450,000 per year and altering diversity lottery to promote entry of even more high-skilled LPRs); *id.* tit. IV (establishing H-2C temporary worker program for low-skilled workers).

<sup>130</sup> See INA § 316, 8 U.S.C. § 1427(a) (2006) (requiring five years of residence prior to naturalization).

<sup>131</sup> See S. 2611 tit. VI (providing eventual path to LPR status through self-petition or through existing visa applications).

<sup>132</sup> Treaty Establishing the European Community art. 19, Dec. 24, 2002, 2002 O.J. (C 325) 33, 45.

employer.<sup>133</sup> This feature of the law gives the employer a great deal of bargaining power and makes the migrant vulnerable to holdup—a threat to terminate the migrant unless she accepts lower pay—and other forms of opportunism.<sup>134</sup>

As a consequence, at the margin, the migrant will make employer-specific investments—investments in employer-related skills whose cost can be recovered only through employment—rather than country-specific investments. The reason is that the migrant can recover the costs of her investments only by remaining with the employer. From the perspective of the host country, this arrangement may not be ideal. The host country benefits more from country-specific investments than from employer-specific investments. At the margin, the migrant may invest more in employer-related skills than in learning the cultural norms of the country. For example, an English-speaking German migrant in France, working for a firm where the working language is English, may not bother to learn French, preferring to improve his English.

A further consideration is that migrants may be hesitant about entering a country and making country- and employer-specific investments if the employer has so much bargaining power. The employer has a strong *ex post* incentive to hold up the migrant, forcing her to choose between low wages that do not cover her *ex ante* investments or returning to her native country where her wages are even lower.<sup>135</sup> To attract migrants who are hesitant for these reasons, employers would need to establish a reputation for fair *ex post* treatment or agree to contractual obligations along the same lines.

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<sup>133</sup> See INA §§ 101(a)(15)(H)(ii)(b), 214, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184 (2006) (describing requirements for H-2B agricultural workers, whose status is dependent on employment by firm that sponsors them); 8 C.F.R. § 214.2(h) (2009) (same). Some employment visas permit migrants to change jobs but make it cumbersome to do so, thereby limiting labor market mobility as a practical matter. See, e.g., INA § 214(n), 8 U.S.C. § 1184(n) (H-1B portability provision).

<sup>134</sup> See NGAI, *supra* note 76, at 139–44 (criticizing Bracero program on these grounds); see also CINDY HAHAMOVITCH, *THE FRUITS OF THEIR LABOR: ATLANTIC COAST FARMWORKERS AND THE MAKING OF MIGRANT POVERTY, 1870–1945*, at 168–81 (1997) (describing agricultural employers' historic preference for migrant workers, whose easy deportability led to reduced bargaining power).

<sup>135</sup> Historically, this has been a significant problem in the United States. See NGAI, *supra* note 76, at 138–47 (describing conditions during Bracero Program that made Mexican agricultural workers vulnerable to their employers). Today, it is often a principal objection to those who oppose the creation of larger temporary worker programs, particularly for low-skilled workers. See Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 270 (explaining guest worker vulnerability to sponsoring employer).

### E. Internal Political Economy

Up to this point, we have assumed that the state is a monolithic entity that steadfastly pursues the interests of its native citizens. This simplification helps highlight some important dynamics, but it obscures the internal political economy of the state. Decisions about which migrants to admit and whether (or how quickly) to confer voting rights on them are themselves the product of the existing political process.<sup>136</sup>

Perhaps the most important possibility is that insiders will use immigration policy to try to lock themselves in power. They might attempt to do this in several ways. First, they might do so by keeping out migrants with different electoral preferences, or about whom there is more uncertainty as to their preferences. These migrants might be excluded at the border, or the state might admit them but either deny them voting rights or delay their access to the franchise. This could be accomplished by making migrants ineligible for citizenship or by requiring a longer period of residence before the migrants were eligible for citizenship. Second, this dynamic could operate in reverse, with political insiders encouraging immigration by potential supporters and speeding their access to the franchise (by, for example, shortening the naturalization period or granting voting rights prior to naturalization). A third possibility is that political insiders would encourage emigration by political opponents, either by deporting them or by making their day-to-day lives much less comfortable.

The third possibility seems unlikely in the United States because all voters in national elections today are citizens, and the Constitution prohibits the deportation of citizens.<sup>137</sup> Furthermore, the cost of exit for citizens is often high. Thus, it is hard to imagine the state successfully encouraging or coercing voters to leave by making their lives more difficult. That said, there is some evidence that this strategy has been used at the local level.<sup>138</sup> And the deportation provision in the

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<sup>136</sup> In this sense, there is an important and overlooked parallel between immigration law and the law of democracy: Both contain a basic endogeneity because the legal rules regulate the boundaries that determine who will participate in the setting of future legal rules. This endogeneity is a central theme of modern voting rights scholarship. But it is largely ignored by immigration scholars.

<sup>137</sup> See *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (holding that Constitution guarantees citizen's right to retain citizenship unless voluntarily relinquished); see also *supra* text accompanying note 18 (explaining that citizens have right not to be exiled).

<sup>138</sup> One prominent example is James Michael Curley, the Irish American mayor of Boston, who over decades contributed to the dramatic depopulation of the city's Anglo-Protestant citizens through "aggressive redistribution and incendiary rhetoric." Edward L. Glaeser & Andrei Schleifer, *The Curley Effect: The Economics of Shaping the Electorate*, 21 J.L. ECON. & ORG. 1, 1-2, 9-12 (2005).

1798 Alien and Sedition Act shows that the possibility is not unheard of at the national level.<sup>139</sup>

The first possibility seems considerably more plausible. In fact, some historical episodes in America are consistent with this account. Consider, for example, the rapid changes made to U.S. naturalization rules in the period immediately following the ratification of the Constitution. Over the course of a few short years in the 1790s, Congress sharply expanded the durational residency requirement for naturalization—first from two to five years, and then from five to fourteen years.<sup>140</sup> These changes had the effect of keeping some new migrants out of the voting booth for lengthy periods of time by delaying access to citizenship, and even in situations where citizenship was not required for voting, it precluded office holding by migrants. Many historians have argued that these early changes to naturalization law were in part the product of a fight between nascent American political parties—an attempt by the emerging Federalist Party to keep the government out of the hands of the Jeffersonians, whom many Federalists feared were associated with radical pro-French immigrants.<sup>141</sup>

Since the Alien and Sedition Act episode, the naturalization delay has been stable in blackletter American immigration law. Lawful permanent residents have for the last 200 years been required to live in the United States for five years before becoming eligible to naturalize.<sup>142</sup> Thus, it is tempting to conclude that durational residency requirements have not been used to shape the composition of the electorate.<sup>143</sup>

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<sup>139</sup> Alien Friends Act, ch. 58, 1 Stat. 570, 570–71 (1798) (authorizing President to deport noncitizens considered “dangerous to the peace and safety of the United States”).

<sup>140</sup> See Naturalization Act of 1790, ch. 3, 1 Stat. 103, 103 (establishing requirement of two years residence before naturalization); Naturalization Act of 1795, ch. 20, 1 Stat. 414, 414 (extending required residency period to five years); Naturalization Act of 1798, ch. 54, 1 Stat. 566, 566 (1798) (extending residency period to fourteen years); Act of Apr. 14, 1802, ch. 28, 2 Stat. 153, 153 (1802) (returning residency period to five years).

<sup>141</sup> E.g., STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 590 (1993) (discussing Federalists’ efforts to make naturalization harder and prevent noncitizens from voting because of fears that “inordinate numbers of [noncitizens] seemed disposed to support the Republican party”); SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 78 (2005).

<sup>142</sup> See 2 Stat. 153; INA § 316, 8 U.S.C. § 1427 (2006).

<sup>143</sup> Note that this claim implicitly assumes that voting rights follow automatically from naturalization. In the nineteenth century, however, the right to vote was not so closely associated with the concept of citizenship. See *supra* text accompanying notes 47–52. Thus, in that period it was thinkable to have a separate sort of durational residency requirement for voting. During the 1850s, the anti-immigrant Know Nothings advocated a fourteen- or even twenty-one-year post-naturalization waiting period. When they won control of the Massachusetts government in 1854, the legislature passed a fourteen-year waiting period. While it failed to become law because of the complex rules for amending the Massachusetts Constitution, two years later a coalition of Know Nothings and Republi-

But there are a few important exceptions. First, well into the twentieth century, immigrants from Asia were ineligible to naturalize because of racial bias in the naturalization rules.<sup>144</sup> Second, while the formal residency rule has remained fixed, other changes to U.S. immigration law have created considerable variation in practice. Much of that variation is the product of changes in who falls into the legal category of LPR. In the nineteenth century, basically all immigrants fell into this category.<sup>145</sup> But the twentieth century brought the growth of two new groups: temporary migrants, who were entitled to enter for fixed periods of time, and so-called illegal immigrants, who were not legally entitled to reside in the country.<sup>146</sup>

It might seem like a mistake to call members of these groups migrants, as they are not formally on the path to citizenship. But in practice, they often are. Modern immigration law sometimes offers temporary immigrants the option, after some period of time, to become LPRs. For such migrants, the effect of their initially “temporary” admission is simply to lengthen the period of residence required before naturalization.<sup>147</sup> Relatedly, unauthorized migrants have sometimes been provided the opportunity to become LPRs (through periodic legalizations, the Immigration and Nationality Act’s cancellation of removal provisions, etc.) and eventually citizens.<sup>148</sup> But as a

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cans enacted into law a compromise that prohibited newly minted citizens from voting for the first two years following naturalization. KEYSSAR, *supra* note 15, at 86; 2 ENCYCLOPEDIA OF U.S. LABOR AND WORKING-CLASS HISTORY 750 (Eric Arnesen ed., 2007).

<sup>144</sup> See Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 404 (2004) (outlining racial restrictions on naturalization, some of which remained until 1952).

<sup>145</sup> This statement is accurate for our purposes here, but we should note that it is a simplification. In fact, it is anachronistic to talk about the category of “lawful permanent residents” in nineteenth century America. There was no need to categorize some migrants as “permanent” until categories of “temporary” immigrants were first created by American immigration law in the early part of the twentieth century. See An Act To Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, ch. 29, 39 Stat. 874, 878 (1917) (authorizing rules to “control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission”); An Act To Limit the Immigration of Aliens into the United States, Pub. L. 67-5, ch. 8, 42 Stat. 5, 5 (1921) (establishing first immigration quotas in American history, but excepting certain noncitizens, including some temporary workers, from quota).

<sup>146</sup> See INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2006) (describing categories of “non-immigrants”). See generally NGAI, *supra* note 76 (describing creation of category of illegal aliens).

<sup>147</sup> See, e.g., ALEINIKOFF ET AL., *supra* note 26, at 437–38 (describing transitional status of many formally “temporary” immigrants); see also American Competitiveness in the Twenty-first Century Act, Pub. L. No. 106-313, § 105, 114 Stat. 1253 (2000) (codified at 8 U.S.C. § 1184(n) (2006)) (recognizing transitional status of many who enter initially on H-1B nonimmigrant visas).

<sup>148</sup> See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394 (codified at 8 U.S.C. § 1255a(a) (2006)) (creating legalization program



practical matter these immigrants face a much longer naturalization delay than those initially admitted as LPRs. These rules provide possible examples of attempts by political insiders to protect themselves from political pressures coming from recently arrived migrants with interests different from those of the insiders' constituents.<sup>149</sup>

While this highlights the costs that can flow from a lag between admission and the acquisition of voting rights, the delay has a potential upside as well. Legal rules that delay immigrant access to the franchise (and that make it difficult for insiders to change those rules) can lessen the likelihood that insiders will attempt to manipulate immigration policy to advance their own political interests. They do so in two ways. First, the delay makes it more difficult for insiders to predict the electoral preferences of immigrants admitted under the system. Their preferences may be well known at the time of entry, but there will be considerably more uncertainty about what those preferences will look like years down the road when the migrants gain the right to vote. In this way, lags in naturalization operate somewhat as a temporal veil of ignorance.<sup>150</sup>

Second, the delay may reduce the incentive of political insiders to manipulate the immigration rules in self-interested ways. This is because political insiders likely have limited time horizons. While political parties may lower politicians' discount rates to a certain extent, politicians are still less likely to care as much about elections several electoral cycles in the future than they do about the next few election cycles. Thus, lags in naturalization may have a salutary effect on the political economy of migration policy.<sup>151</sup>

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under which more than two million illegal immigrants obtained green cards); INA § 240A, 8 U.S.C. § 1229b (2006) (providing, through "cancellation of removal," mechanism for small number of unlawful immigrants who satisfy number of criteria to become LPRs); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. tit. VI (2006) (creating large-scale legalization program).

<sup>149</sup> Putting aside durational residency requirements, the basic task of processing applications for citizenship provides additional opportunities for incumbency entrenchment and partisan manipulation. Indeed, during the 2008 presidential elections, there were claims that the executive branch was delaying naturalizations in order to keep LPRs thought to be sympathetic to the Democratic Party from becoming citizens before the election. See, e.g., Tom Curry, *Parties Wrangle over Election-Year Citizenship*, July 1, 2008, <http://www.msnbc.msn.com/id/25446136/>. Perhaps unsurprisingly, these claims were the exact opposite of claims made by Republicans in 1996, who contended that the Clinton administration rushed through naturalizations on the eve of the presidential election. *Id.*

<sup>150</sup> See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 118–23 (rev. ed. 1999) (developing idea of veil of ignorance); Adam B. Cox, Commentary, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 770 & n.70 (2004) (discussing use of temporal veil of ignorance in design of electoral rules).

<sup>151</sup> See Adam B. Cox, *Designing Redistricting Institutions*, 5 ELECTION L.J. 412, 418–21 (2006) (explaining that deferred implementation creates partial temporal veil of ignorance

Focusing on the political rights of migrants makes clear that the political economy of migration policy is more complicated than is often assumed. Consider policies concerning wealth redistribution. There is a large literature on the ways in which immigration and redistributive policies interact. The bulk of this scholarship focuses on the fiscal consequences of migrants—on whether they will be net payers or receivers in the system.<sup>152</sup> But the above discussion shows that such an approach is incomplete because unless migrants are excluded indefinitely from the political process, immigration policy will affect the composition of the electorate voting on such policies in the future.<sup>153</sup>

There is some historical evidence that support for immigration is affected by related sorts of interest-group dynamics. Consider Claudia Goldin's study of immigration restrictionism during the first two decades of the twentieth century.<sup>154</sup> The study highlights the role immigrants themselves can play in the political economy of immigration legislation. From the mid-1890s until the passage of the National Origins Quota Act in 1921, anti-immigrant forces tried to close the door to immigrants. On several occasions, Congress passed restrictive literacy requirements that were vetoed by the President. Twice, the House managed to override the presidential veto, but until 1917 the two chambers could not together muster the votes needed to write the literacy requirement into law.

Goldin shows that the political power of the immigrants themselves was a central reason why it took restrictionist forces twenty years to succeed. Examining city-level data, she finds that increases in the percentage of foreign-born in a city initially raised the likelihood that the city's representatives in Congress would vote in a restrictionist direction. Her theory is that increasing the immigrant

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that could make legislators less likely to use political process to pursue their political self-interest).

<sup>152</sup> See GEORGE J. BORJAS, *HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY* 121–22 (1999) (surveying research on this question).

<sup>153</sup> For a few early attempts to grapple with this problem, see, for example, Jess Benhabib, *On the Political Economy of Immigration*, 40 *EUR. ECON. REV.* 1737 (1996); Edith Sand & Assaf Razin, *The Role of Immigration in Sustaining the Social Security System: A Political Economy Approach* 17–18 (CESifo, Working Paper No. 1979, 2007). For a more general attempt to model situations in which current policy choices (such as immigration policy) affect the future distribution of political power, see Jinhui H. Bai & Roger Lagunoff, *On the Faustian Dynamics of Policy and Political Power* (Geo. U. Dep't Econ., Working Paper No. Gueconwpa~08-08-02, 2008), available at <http://ideas.repec.org/p/geo/guwopa/gueconwpa~08-08-02.html>.

<sup>154</sup> Claudia Goldin, *The Political Economy of Immigration Restriction in the United States, 1890 to 1921*, in *THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY* 223 (Claudia Goldin & Gary D. Libecap eds., 1994).

workforce depressed wage growth and produced a backlash among native voters. But once the foreign-born fractions reached a certain level—about thirty percent of the city’s total population—almost all representatives voted against restriction.<sup>155</sup> For her, this finding “underscores the critical importance of reinforcing flows of immigration in building and maintaining the open immigrant vote”<sup>156</sup> during the early part of the twentieth century.

Goldin’s work, along with the recent work on immigration and welfare policy,<sup>157</sup> highlights the twin concerns a state might have about conferring political rights on migrants: first, that the migrants will change the sorts of public goods that the state provides; second, that they will affect the state’s immigration policy itself. These twin concerns point to an overlooked design possibility: Migrants could be given voting rights with respect to one set of policies but not the other. This might initially seem implausible, because we generally do not think about extending the franchise in issue-specific ways. But it is important to realize that the most prominent contemporary proposals concerning noncitizen voting actually do embody this sort of separation.

Today, advocates of noncitizen voting argue most vociferously for local rather than national voting rights.<sup>158</sup> The argument for local voting is usually cast in the language of membership and obligation. The claim is that noncitizens truly are “members” of their local community, such that they deserve local voting rights, even though they are not yet full members of the national community.<sup>159</sup> But our approach suggests a different argument for local but not national voting rights, one that focuses on the types of policies at stake rather than the membership claims of migrants. Local voting rights give migrants more control over many of the local public goods that most directly affect their daily lives, like public schools and zoning. But local voting rights give them much less control over immigration

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<sup>155</sup> *Id.* at 253.

<sup>156</sup> *Id.* at 254–55 (arguing that flows were reinforcing from 1900 to 1910 but diluting from 1910 to 1920).

<sup>157</sup> *E.g.*, Benhabib, *supra* note 153, at 1742–43 (discussing impact of migrants on Receiving State’s immigration policy); Myers & Papageorgiou, *supra* note 13 (discussing possible detrimental impact of illegal migrants on “redistributive public sector” of Receiving State); Sand & Razin, *supra* note 153 (discussing impact of migrants on sustainability of social security system).

<sup>158</sup> In fact, a smattering of local governments around the country have responded and authorized noncitizen voting. RON HAYDUK, *DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES* 87–107 (2006) (describing extension of franchise to immigrants in Chicago, six towns in Maryland, and New York City).

<sup>159</sup> *E.g.*, *id.* at 54–65; Raskin, *supra* note 38, at 1441–45; Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right To Vote?*, 75 MICH. L. REV. 1092, 1112–19 (1977).

policy, which is principally made by the national government. Thus, separating the local and national franchise for noncitizens may provide a rough and ready mechanism by which the state can give migrants some control over policies that affect them without allowing them to affect immigration policy itself.

#### IV INTERACTION EFFECTS

The basic model in Part II assumed that there was only one state in the picture. In reality, multiple host states compete for migrants, especially wealthy and highly skilled migrants.<sup>160</sup> Moreover, the preferences of Sending States will often interact with Receiving State preferences in ways that affect migrants' rights. This Part discusses some insights that follow when we relax the single-state-actor assumption of the basic migration contract model.

Before proceeding, we should address the conceptual possibility of Sending States bargaining directly with Receiving States. In principle, all states could enter a treaty that provided for a migration policy that would make all states better off. The treaty would provide the terms of admission and the conditions under which states could deport migrants or otherwise affect their way of life. Such a treaty would protect country-specific investments by migrants and would limit the adverse effects from competition for migrants.

Historically, such bargaining has sometimes occurred, and migrants' rights have often turned on explicit agreements or coordination strategies between states. In eighteenth-century Europe, for example, migrants' rights in the Receiving State were frequently based on reciprocity with the Sending State.<sup>161</sup> Early United States history reveals similar practices, with migrants' rights to own property often regulated through bilateral arrangements with other nations.<sup>162</sup>

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<sup>160</sup> Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competition Immigration Regimes*, 81 N.Y.U. L. REV. 148, 151 (2006).

<sup>161</sup> See, e.g., PETER SAHLINS, *UNNATURALLY FRENCH: FOREIGN CITIZENS IN THE OLD REGIME AND AFTER* 13–14, 225–35 (2004) (documenting eighteenth century growth of agreements between France and other nations to waive, on a reciprocal basis, restrictions on the ability of foreigners to transmit property at death).

<sup>162</sup> There was variation in this treaty practice during the Founding period. Some bilateral treaties granted full property-holding rights to noncitizens. See, e.g., Treaty of Amity and Commerce, U.S.-Fr., Feb. 6, 1778, 8 Stat. 12; Treaty of Amity and Commerce, U.S.-Swed., Apr. 3, 1783, 8 Stat. 60; Treaty of Amity, Commerce and Navigation (Jay Treaty), U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116. Others granted more limited rights, requiring that real property held by noncitizens be sold upon death. See, e.g., Treaty of Amity and Commerce, U.S.-Prussia, July–Sept. 1785, 8 Stat. 84; Treaty of Friendship, Limits and Navigation, U.S.-Spain, art. XI, Oct. 27, 1795 8 Stat. 138. For an impressive survey of these early American treaty provisions, which explains that much of the variation resulted from

And later in the nineteenth century, the rights of the Chinese migrants who sparked the first wave of restrictionist immigration policy in the United States were the product of a treaty with China.<sup>163</sup> Today, such bargaining between states is much less frequent than one might expect.<sup>164</sup> In fact, a pressing question is why capital flows and trade are pervasively the subject of bilateral and multilateral agreements, while migration flows are much less frequently the subject of international agreement.<sup>165</sup> Nonetheless, because this question and others concerning direct bargaining are beyond our framework, we leave them aside for now.

### A. Labor Competition and Market Segmentation

It is a familiar idea that states compete for certain migrants, such as those with particular skills.<sup>166</sup> It is a less familiar idea that this competition might affect a state's design of migration rights. As we have noted at various points, a state's optimal choice of migration policy may depend on the policies of other states. These interactions are sometimes obvious and sometimes not.

Suppose that a Sending State (say, India) has numerous sophisticated computer engineers who can earn higher wages in foreign states. Imagine there is only one possible Receiving State. Employers in the Receiving State will compete for the engineers and will offer them a wage equal to their marginal productivity. This will, in fact, equal the wage of native workers with the same skills, or perhaps undercut it slightly as the market adjusts to the influx of labor. Whatever the case, the migrant workers will likely enjoy a considerable increase in their wage.

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Founding-era disagreements about the power of the federal government to regulate a matter traditionally controlled by state common law, see David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1104–27, 1158–74, 1178 n.3 (2000).

<sup>163</sup> See LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 9 (1995) (describing Burlingame Treaty, which provided that Chinese immigrants in United States would be entitled to same privileges as citizens of most favored nation).

<sup>164</sup> Refugee treaties are the only kind of multilateral agreements relating to migration that are common today. See, e.g., Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

<sup>165</sup> For a recent effort to begin thinking about this puzzle, see Jennifer Gordon, *Explaining Immigration Unilateralism*, 104 Nw. U. L. REV. (forthcoming 2010) (on file with the *New York University Law Review*).

<sup>166</sup> E.g., Shachar, *supra* note 160, at 167–99. See generally Petra Zaletel, *Competing for the Highly Skilled Migrants: Implications for the EU Common Approach on Temporary Economic Migration*, 12 EUR. L.J. 613 (2006).

Now, the employers in the Receiving State may be dissatisfied with this regime for at least two reasons. First, suppose that the Receiving State law provides migrants with few rights, so that migrants make few country-specific investments. As a result, the migrants are less valuable to the employers than they otherwise would be. The employers might lobby the Receiving State government to improve protections for migrants. The costs will be largely borne by other citizens of the Receiving State, who may be unable to organize to resist the new migration laws. It is also possible that greater protections for migrants would benefit nearly everyone (or at least not harm anyone much).

Second, employers might try to use Receiving State laws to cartelize the migrant labor market. Because employers must compete for migrants, the migrants' wages will be relatively high. But suppose that a new law allows migrants to stay in the Receiving State only as long as they remain employed with a particular sponsoring employer.<sup>167</sup> Such a rule would greatly decrease the bargaining power of the migrants once they arrived. To be sure, such a rule would reduce migration and also country-specific investment. But for individual employers, the gains could exceed the costs, especially since some of the costs would be borne by others.

If, however, the number of possible Receiving States increases, then it will be more difficult for a particular Receiving State that seeks migrant labor to adopt laws that restrict the rights of migrant workers once they arrive. They will, in effect, be outbid by other Receiving States, which will provide a more appealing package of rights and privileges to potential migrants—for example, greater flexibility to change jobs or a quicker and more certain path to citizenship. We might predict, then, that as the number of possible Receiving States increases, the legal packages offered to migrants will become more generous and uniform.

Another possibility is that market segmentation will occur. Suppose that there are two types of Receiving States: those that can easily assimilate migrants (e.g., the United States) and those that cannot easily assimilate migrants (e.g., Japan). It is cheaper for the easy-assimilators to offer generous migration rights, such as a quick path to citizenship. These packages would attract a certain type of migrant—for example, younger people who seek to start families after migrating. As a result, neither the Receiving State nor employers in its territory would need to “bribe” the migrant to come by offering

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<sup>167</sup> Many U.S. employment visa categories significantly restrict job mobility. See, e.g., INA § 214(n), 8 U.S.C. § 1184(n) (2006).

generous wages. By contrast, the difficult-assimilators may have to offer financial inducements in order to compensate the migrant for the higher risk of removal or other adverse action. In these countries, guest- or contract-workers might be more common.

Finally, consider another interesting asymmetry: Some Receiving States are more alike than others. A Brazilian who learns English does not make a country-specific investment; a Brazilian who learns Japanese does. The English-speaking Brazilian can obtain work in any anglophone country—the United States, England, Australia, New Zealand, Canada, etc.—as well as the numerous other countries where English has become a lingua franca in the business world. The Japanese-speaking Brazilian, as a practical matter, can recover the cost of her investment in only one place: Japan.<sup>168</sup> All else equal, therefore, Japan must offer migrants more generous rights than an anglophone country in order to attract them and persuade them to learn the language. Anglophone countries thus have immense competitive advantages in the market for migrants: They can attract many more migrants without offering them generous rights, thus retaining valuable flexibility.

Not all investments exhibit this interaction effect. For example, anglophone countries may still have to offer generous rights to the extent necessary to encourage migrants to form marital and other emotional bonds with citizens. These investments in personal relationships are more consistently country-specific. And their existence has important implications in light of globalization. To the extent that globalization homogenizes some basic aspects of societies and increases the dominance of a few languages such as English, Spanish, and Chinese, migration will involve fewer country-specific investments, and migrants need worry less about opportunistic state behavior. We might predict, therefore, that immigration contracts will become more flexible in the future as the precommitment problem becomes less severe. Yet, even in a radically globalized world, personal and social relationships will continue to be important country-specific investments for which many migrants will demand protection.<sup>169</sup>

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<sup>168</sup> See *supra* text accompanying notes 56–58.

<sup>169</sup> This would not be true, of course, in a world where physical proximity were unimportant for these relationships. But despite the rise of social networking and a variety of other forms of relationships in the virtual world, primacy of presence is almost certainly going to be central to human relationships for a long time.

### B. Dual Citizenship

Dual citizenship exists when a person is the citizen of two countries. Some nations permit dual citizenship and even citizenship in more than two countries. Canada, France, and the United Kingdom, for example, have historically been open to plural citizenship.<sup>170</sup> Other nations, such as Austria and Japan, have more restrictive regimes. Austria requires naturalizing immigrants to expatriate themselves from their countries of origin. Japan requires those who acquire dual citizenship at birth to choose a single nationality before they turn twenty-two.<sup>171</sup> The phenomenon of dual citizenship raises some interesting questions within our framework.

Consider an example that simplifies the law but also brings out clearly the differences between the approaches. A person migrates from her Sending State to a Receiving State. Under the single citizenship approach, the Receiving State grants the migrant citizenship rights only if she renounces the citizenship of the Sending State. Under the dual citizenship approach, the Receiving State grants the migrant citizenship rights even if she does not renounce the citizenship of the Sending State. Note that the Sending State faces the same choices: It can withdraw citizenship from the migrant if she accepts Receiving State citizenship, or it can permit dual citizenship. Thus, a person can have dual citizenship only when her Sending State and Receiving State both permit it. How might the Receiving State and the Sending State choose among these two approaches?

The main difference between the two approaches from the Receiving State's perspective is that the dual citizen retains the protection of the Sending State. In practice, this protection could mean different things. At a minimum, the migrant retains an exit option—the option to leave the Receiving State and resettle in the Sending State if conditions in the Receiving State turn unfavorable.<sup>172</sup> This exit option is clearly more valuable than the simple right to leave that is retained by the non-dual citizen, because she may not be able to

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<sup>170</sup> T. Alexander Aleinikoff & Douglas Klusmeyer, *Plural Nationality: Facing the Future in a Migratory World*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* 76–77 (Aleinikoff & Klusmeyer eds., 2001).

<sup>171</sup> *Id.* at 77.

<sup>172</sup> To be sure, even for dual citizens, the exit option is often not absolute. Sending States sometimes refuse to permit emigrants to return home, though this is most common when they are being deported by a Receiving State. See *Zadvydas v. Davis*, 533 U.S. 678, 684–86 (2001) (describing two deportation candidates whose countries of origin refused to repatriate). Moreover, it is sometimes not safe for an emigrant to return home. See, e.g., William Glaberson, *Release of 17 Guantanamo Detainees Sputters as Officials Debate the Risk*, N.Y. TIMES, Oct. 16, 2008, at A20 (discussing fact that some Chinese detainees at Guantanamo Bay faced persecution if returned to China).



find an appealing alternative country to accept her if she chooses to leave, and usually the Sending State, as her native land, will be her most appealing alternative to the Receiving State. Dual citizenship could also offer other protections. The migrant might have access to the diplomatic protection of the Sending State. For example, if the Receiving State violates her rights, officials of the migrant's country of origin could come to her defense.<sup>173</sup>

From the Sending State's perspective, allowing outgoing migrants to retain citizenship creates obligations for the state without any immediate benefits. The Sending State has an obligation to accept the migrant if she returns and perhaps also to offer diplomatic aid and protection in the Receiving State. Thus, the Sending State is more likely to grant dual citizenship rights if it wishes to encourage emigration, or if it believes that it benefits from maintaining ties with those of its citizens who would choose to emigrate regardless of the Sending State's dual citizenship policy.<sup>174</sup>

From an *ex ante* perspective—that is, at the time of migration—the Receiving State must weigh the competing effects of dual citizenship on country-specific investment and flexibility. A migrant who is allowed to retain dual citizenship will have greater bargaining power once she arrives. For example, she may be able to persuade the Sending State to put pressure on the Receiving State if the latter is inclined to deprive migrants of certain rights or to ignore their interests. Thus, a state may strengthen its precommitment, and hence encourage country-specific investment, by allowing the migrant to draw on the resources of the Sending State.

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<sup>173</sup> As a formal matter, international law may prohibit diplomatic intervention in some such cases. See Convention on Certain Questions Relating to the Conflict of Nationality Laws, art. 4, Apr. 12, 1930, 179 L.N.T.S. 89 [hereinafter 1930 Convention] (“A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.”). But this formal rule will often not stop a citizen from requesting state protection and will often not stop a state from coming to a citizen's aid. Aleinikoff & Klusmeyer, *supra* note 170, at 73–75.

<sup>174</sup> In recent years, a number of emigration-encouraging states in Southeast Asia, Africa, and elsewhere have relaxed their citizenship policies to permit dual citizenship (or sometimes dual nationality) for citizens living abroad. See Kim Barry, *Home and Away: The Construction of Citizenship in an Emigrant Context*, 81 N.Y.U. L. REV. 11, 49–50 (2006) (discussing changes in this direction by Philippines, Turkey, and India); Eva Østergaard-Nielsen, *International Migration and Sending Countries: Key Issues and Themes*, in INTERNATIONAL MIGRATION AND SENDING COUNTRIES: PERCEPTIONS, POLICIES AND TRANSNATIONAL RELATIONS 3, 19 (Eva Østergaard-Nielsen ed., 2003) (discussing dual citizenship policies in Latin America, Africa, and Southeast Asia). For a general discussion about why states may benefit from these ties and what strategies they use to maintain them, see generally Symposium, *A Tribute to the Work of Kim Barry: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 1 (2006).

Moreover, permitting a naturalizing immigrant to retain her prior citizenship lowers the cost of naturalization for the migrant because she is not required to forfeit formal ties to her homeland that she might value. This may spur increased naturalizations and generate greater country-specific investments by migrants.<sup>175</sup> Of course, a migrant's retention of her original citizenship could also undermine her incentive to engage in country-specific investment because she would be more likely to retain ties to the Sending State and to see the option of returning there as valuable.<sup>176</sup>

Whatever its ultimate effect on levels of country-specific investment over time, dual citizenship will afford the migrant more power to prevent the Receiving State from making needed policy changes in response to crises or changes in preferences of native citizens. If the migrant remains loyal to the Sending State, and the crisis involves a breakdown in the relationship between the two countries, the migrant's citizenship-derived political power in the Receiving State may be deeply unattractive for the native citizens of that country.

Seen in this way, dual citizenship appears as just another right that—like basic rights, the right to remain, and participation rights—can be used to encourage migrants to enter and make country-specific investments. But by the same token, dual citizenship can tie the hands of the Receiving State and prevent it from modifying its demos if events change.<sup>177</sup>

Dual citizenship also has distinctive features. Unlike the other rights, its value for the migrant (and hence for the Receiving State as a precommitment device) is a function of the interests and diplomatic power of the Sending State. The value of dual citizenship for the migrant is high when two conditions are met: first, when the Sending State is powerful enough that its diplomatic pressure on behalf of the migrant will affect the policies of the Receiving State, and second, when the Sending State has an interest in protecting its overseas diaspora.

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<sup>175</sup> There is some evidence that traditionally restrictive countries like Sweden have begun to allow dual citizenship in an effort to increase immigrant integration—that is, to promote country-specific investments by migrants. Tanja Brøndsted Sejersen, "I Vow to Thee My Countries"—*The Expansion of Dual Citizenship in the 21st Century*, 42 INT'L MIGRATION REV. 523, 535 (2008).

<sup>176</sup> Compare Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1468–69 (1997) (arguing that retention of former nationality will not slow assimilation), with SCHUCK, *supra* note 3, at 238 (questioning Spiro's claim and suggesting that there is little evidence about effect of dual nationality on assimilation rates).

<sup>177</sup> Cf. Aleinikoff & Klusmeyer, *supra* note 170, at 77 (discussing some other reasons why nation's openness to dual citizenship may turn on whether nation is interested in immigration or emigration).

The first factor is straightforward; the second is more complex. Why would the Sending State have an interest in protecting its emigrants? There are a number of interconnected answers: to reduce population pressures, to obtain remittances, to establish links with other countries, to meet a demand for employment opportunities abroad, etc. None of these possible motives is necessarily clear, however. Consider the Sending State's interest in remittances. On the one hand, by protecting emigrants, it encourages them to make country-specific investments, which should lead to higher wages and thus higher remittances. On the other hand, by protecting emigrants and encouraging them to make country-specific investments, it may cause them to become more deeply assimilated in the Receiving State, and thus to lose their loyalty to the Sending State and the people who live there, which would drive down remittances.

A number of propositions follow. One is that, all else equal, countries with high internal demand for emigration will be more likely to permit migrants to become dual citizens, and countries with high demand for immigration will be more likely to permit migrants to become dual citizens. But our main point is different and is taken from our discussion of participation rights. The Receiving State will be more likely to permit dual citizenship if it does not believe that the Sending State will use diplomatic pressure to advance the interests of migrants in a manner that injures the Receiving State.<sup>178</sup> As noted above, the likelihood that the Sending State will do this depends both on its interests and its power. The Receiving State need not worry about a weak Sending State; it also need not worry if the Sending State's migrant-derived interests do not differ much from the interests of the Receiving State. This is most likely to be the case when the migrants have political preferences that are similar to those of the Receiving State's native citizens.

The possible interaction problems can be multiplied indefinitely. We have already discussed how states might compete using child-citizenship rights.<sup>179</sup> Problems could also arise where conflicting citizenship rules lead to children having no citizenship: for example, if

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<sup>178</sup> The flip side is that Sending States will be more likely to permit dual citizenship if they believe their citizens will use their political influence in the Receiving State to benefit the Sending State. There is some evidence that this motivation played a part in Mexico's recent decision to permit emigrants naturalized abroad to retain their Mexican nationality. Barry, *supra* note 174, at 46–47; see also Eva Østergaard-Nielsen, *The Politics of Migrants' Transnational Political Practices*, 37 INT'L MIGRATION REV. 760, 764–65 (2003) (describing, in context of U.S.–Latin American relations, “attempts of sending country governments and elites to coopt nationals abroad in an attempt to tap into their various economic and political resources”).

<sup>179</sup> See Part III.B *supra*.

the two parents are from different countries, each of which grants citizenship rights only to children with two parents from that country.<sup>180</sup> These problems—some of which are interesting, others of which are simply confusing—are best left to future work.

### C. *Refugees and Asylum-Seekers*

Interaction effects are also important for refugee law. Refugees typically flee civil wars and other forms of political, religious, and ethnic conflict. By offering to accept refugees, Receiving States grant them exit options that are conditional on the domestic conflict reaching a threshold level of severity.

From the perspective of refugees or potential refugees, the exit option is of mixed value. On the one hand, the availability of refugee status gives one the ability to escape a dangerous situation. On the other hand, a person who is inclined to stay in her country of origin and fight will find that others will leave rather than join the fight if refugee status is available. Thus, liberal refugee laws will encourage flight and might also increase the incentive for governments or other groups to try to drive out populations that are not loyal to them, including ethnic minorities.

In this fashion, the policies of the Receiving (asylum) State interact with those of the Sending State. Nonetheless, despite the potential theoretical costs of undermining resistance movements and encouraging strategic behavior by governments in conflict-ridden states, in practice the humanitarian costs of civil war and domestic persecution are often too great for other countries to deny refugee status.

But this leads to a second interaction effect—one between the potential Receiving States. These states may all want refugees to have an available place of asylum, but each state would prefer that the refugees be taken in by another state. Moreover, because the cost of refugee flows falls disproportionately on neighboring countries,<sup>181</sup> those countries may threaten to deny entrance unless other countries either accept a share of the refugee population or offer financial incentives. Recognizing this collective action problem, countries have developed various cooperation mechanisms, including treaties to address the issue.<sup>182</sup>

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<sup>180</sup> This citizenship coordination problem led to attempts during the twentieth century to craft an international legal solution. *E.g.*, 1930 Convention, *supra* note 173.

<sup>181</sup> Neighboring countries often face the brunt of the burden simply because of proximity: Refugees fleeing conflict or persecution often flow over the closest available border.

<sup>182</sup> For a discussion of how countries might better solve this collective action problem, see Ahilan T. Arulanantham, *Restructured Safe Havens: A Proposal for Reform of the*

There is also the problem of distinguishing sincere refugees from other migrants, such as economic migrants. Refugee status can be quite valuable. While refugees in many countries are confined to camps near the border of their home country, in countries like the United States, refugees are given generous rights, including work permits and the ability to become LPRs and then citizens.<sup>183</sup> Consequently, much refugee law and policy is concerned with screening for valid refugee claims and deterring invalid ones.<sup>184</sup>

Where there are many potential asylum states, their screening policies may interact. States with more stringent standards for asylum are likely to attract more applicants with strong claims, because those with weaker claims are less likely to satisfy the stringent standard. Those with weaker claims will be more likely to seek asylum in states with lower standards. This means that a state's optimal refugee screening rules will depend on the rules in other potential Receiving States. Without coordination, this interaction could lead to a race to the bottom, in which all states adopt screening policies that are excessively stringent.<sup>185</sup> Only international cooperation of some sort can solve this problem.

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*Refugee Protection System*, 22 HUM. RTS. Q. 1, 44–56 (2000); James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Col-lectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 201–09 (1997); Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243, 251, 254–59 (1997).

<sup>183</sup> See INA § 208(c)(1)(B), 8 U.S.C. § 1158(c)(1)(B) (2006) (requiring Attorney General to provide work authorization to successful asylum applicants); INA § 209(a)(1)(B), 8 U.S.C. § 1159(a)(1)(B) (permitting asylees to adjust their status to that of LPR after one year).

<sup>184</sup> To be sure, many states also attempt to deter claimants who can clearly establish their status as refugees. This is in part because of the collective action problem identified above: States would prefer that even valid refugees end up in some other state. The desire to deter valid claimants is also driven by perceived capacity constraints. For example, when faced with the mass influx of potential refugees from Cuba and Haiti, the United States adopted interdiction policies and refugee-screening procedures that seemed deliberately designed to screen out high numbers of valid applicants. See Joyce A. Hughes, *Flight from Cuba*, 36 CAL. W. L. REV. 39, 58–64 (1999) (detailing policy shift to exclusion of Cuban “balseros” in 1994).

<sup>185</sup> See Ryan Bubb, Michael Kremer & David Levine, *The Economics of International Refugee Law* 4–20 (Weatherhead Ctr. for Int'l Affairs, Working Paper No. 2008-0085, 2008), available at <http://www.wcfia.harvard.edu/node/2741> (providing model of race to bottom in refugee policy); Jenny Monheim & Marie Obidzinski, *Optimal Discretion in Asylum Lawmaking* 5–22 (BETA, Working Paper No. 2007-31, 2007), available at <http://econpapers.repec.org/paper/u/ulpsbbeta/2007-31.htm> (proposing related model of refugee policy).

## CONCLUSION

We have now offered two basic models that greatly simplify the problem of optimal migration policy. In an earlier paper, we treated the relationship between the Receiving State and the migrant as akin to an employment relationship, where the migrant has private information about her “type” and the Receiving State must devise mechanisms for discovering that information.<sup>186</sup> In this paper, we treat the relationship as a generic contractual relationship, where the Receiving State seeks to attract entry and investment while retaining some flexibility and the migrant must decide whether to make country-specific investments based on the Receiving State’s migration policies.

For future work, we can see three possible directions. First, there are other possible approaches to the basic migrant–Receiving State relationship, and focus can be turned to other variables different from the ones we have just touched on. For example, future work could focus on the value of the migrant’s exit option and the extent to which that exit option limits the Receiving State’s policy choices.

Second, there are numerous immigration rules that are of great importance but whose incentive effects have received little attention. For example, various rules limit the employment options of foreign students, tourists, and spouses of migrants. These rules deserve more attention.

Finally, the topic of “interaction effects” is of great importance but also has received little attention. States compete and cooperate with respect to migration in complex ways. What determines the conditions under which states grant dual citizenship? How does competition for migrants affect the determination of rights? Why is it that in the past many states restricted the rights of native citizens to emigrate and why is such restriction so rare today? Why do states offer different types of rights to people from different countries of origin? We have suggested some angles from which to approach these questions, but much work remains to be done before satisfactory answers can be given.

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<sup>186</sup> Cox & Posner, *supra* note 10.